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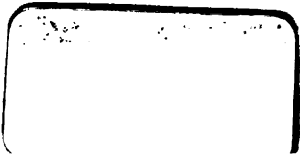
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PART XIV.

PUBLIC ADMINISTRATOR.

CHAPTER I.

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PUBLIC ADMINISTRATORS.

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§ 843. To take charge of what estates.

Every public administrator, duly elected, commissioned, and qualified, must take charge of the estates of persons dying within his county, as follows:

1. Of the estate of decedents for which no administrators are appointed, and which, in consequence thereof, are being wasted, uncared for, or lost;

2. Of the estate of decedents who have no known heirs;

3. Of the estates ordered into his hands by the court; and

4. Of the estates upon which letters of administration have been issued to him by the court.—*Kerr's Cyc. Code Civ. Proc.*, § 1726.

§ 843.¹ Burial expenses of deceased persons.

Whenever a public administrator takes possession of the estate of a deceased person, as provided in section one thousand seven hundred and twenty-six of this code, and the method of the defrayal of the expense of the burial of said deceased is not otherwise provided for by law, or by the rules, agreement or death benefits of any order or lodge to which the deceased may at the time of his death belong, or with which he may have been affiliated, the public administrator may, in order to defray the proper expenses of the burial of the body of the deceased, and the expenses of the last illness apply to a judge of the superior court of the county in which said public administrator is acting for an order permitting the public administrator to summarily sell any personal property belonging to the deceased, and to withdraw any money that the deceased may have on deposit with any bank, and to collect any indebtedness or claim that may be owing to or due the deceased. If upon such application it appears to the court by competent evidence, that the total value of the estate of the deceased is less than one hundred dollars the judge shall make an order

granting the application and there shall be no administration upon the estate of the deceased unless additional estate be found or discovered. No notice of the application need be given and no fee shall be charged by the clerk of the court or the public administrator or his attorney for the filing of said application, or for any duty or service of the clerk or public administrator or his attorney connected therewith. Upon the sale of the personal property of the deceased, or the collection of any money, claim or indebtedness by the public administrator under said order the public administrator shall use the same for the expenses of the burial of the deceased, and the expenses of the last illness. The public administrator shall file with the clerk of the court a statement showing the property of the deceased that came into his hands and the disposition of the property of the deceased, and shall file with the clerk vouchers showing what disposition was made of the said property or of the proceeds thereof.—*Kerr's Cyc. Code Civ. Proc.*, § 1726a.

NOTE. Order to sell personal property of deceased to defray burial expenses.—See, ante, § 488.1

§ 844. To obtain letters, when and how. Bond and oath.

Whenever a public administrator takes charge of an estate, which he is entitled to administer without letters of administration being issued, or under order of the court, he must, with all convenient dispatch, procure letters of administration thereon, in like manner and on like proceedings as letters of administration are issued to other persons. His official bond and oath are in lieu of the administrator's bond and oath; but when real estate is ordered to be sold, another bond may be required by the court.—*Kerr's Cyc. Code Civ. Proc.*, § 1727.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Idaho—Compiled Statutes of 1919, section 7777.

Montana—Revised Codes of 1907, section 3074.

North Dakota—Compiled Laws of 1913, section 3445.

§ 845. Duty of persons in whose house any stranger dies.

Whenever a stranger, or person without known heirs, dies intestate in the house or premises of another, the possessor of such premises, or any one knowing the facts, must give immediate notice thereof to the public administrator of the county; and in default of so doing, he is liable for any damage that may be sustained thereby, to be recovered by the public administrator, or any party interested.—*Kerr's Cyc. Code Civ. Proc.*, § 1728.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho*—Compiled Statutes of 1919, section 7778.

Montana*—Revised Codes of 1907, section 3075.

§ 846. Inventory. How to administer estates.

The public administrator must make and return a perfect inventory of all estates taken into his possession, administer and account for the same according to the provisions of this title, subject to the control and directions of the court.—*Kerr's Cyc. Code Civ. Proc.*, § 1729.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho—Compiled Statutes of 1919, section 7779.

Montana*—Revised Codes of 1907, section 3076.

§ 847. Must deliver up estate when.

If, at any time, letters testamentary or of administration are regularly granted to any other person on an estate of which the public administrator has charge, he must, under the order of the court, account for, pay, and deliver to the executor or administrator thus appointed, all the money, property, papers, and estate of every kind in his possession or under his control.—*Kerr's Cyc. Code Civ. Proc.*, § 1730.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho*—Compiled Statutes of 1919, section 7780.

Montana*—Revised Codes of 1907, section 3077.

North Dakota—Compiled Laws of 1913, section 3448.

§ 848. Notice to, by civil officers, of waste.

All civil officers must inform the public administrator of all property known to them, belonging to a decedent, which is liable to loss, injury, or waste, and which, by reason thereof, ought to be in the possession of the public administrator.—*Kerr's Cyc. Code Civ. Proc.*, § 1731.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho*—Compiled Statutes of 1919, section 7781.

Montana*—Revised Codes of 1907, section 3078.

Nevada—Revised Laws of 1912, section 1622.

North Dakota—Compiled Laws of 1913, section 3446.

§ 849. Suits for property of decedents.

The public administrator must institute all suits and prosecutions necessary to recover the property, debts, papers, or other estate of the decedent.—*Kerr's Cyc. Code Civ. Proc.*, § 1732.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho*—Compiled Statutes of 1919, section 7782.

Montana*—Revised Codes of 1907, section 3079.

North Dakota—Compiled Laws of 1913, section 3447.

§ 850. Order on public administrator to account.

The court may, at any time, order the public administrator to account for and deliver all the money and property of an estate in his hands to the heirs, or to the executors or administrators regularly appointed.—*Kerr's Cyc. Code Civ. Proc.*, § 1735.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho*—Compiled Statutes of 1919, section 7785.

Montana*—Revised Codes of 1907, section 3082.

§ 851. When to make and publish return of condition of estate.

The public administrator, or any person who received letters of administration while acting as public administrator, must, once in every six months, make to the su-

perior court, under oath, a return of all the estates of decedents which have come into his hands, the value of each estate, the money which has come into his hands from every such estate, and what he has done with it, and the amount of his fees, and expenses incurred in each estate, and the balance, if any, in each such case remaining in his hands; publish the same six times in some newspaper published in the county, or if there is none, then post the same, legibly written or printed, in the office of the county clerk of the county. One copy of the return must be filed with papers in each estate so reported.—*Kerr's Cyc. Code Civ. Proc.*, § 1736.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Idaho—Compiled Statutes of 1919, section 7786.

Montana—Revised Codes of 1907, section 3083.

§ 852. Disposition of moneys. Escheat, etc.

It is the duty of every public administrator, as soon as he receives the same, to deposit with the county treasurer of the county in which the probate proceedings are pending, all moneys of the estate; and such moneys may be drawn upon the order of the public administrator, countersigned by a superior judge, when required for the purposes of administration. It is the duty of the county treasurer to receive and safely keep all such moneys, and pay them out upon the order of the public administrator, when countersigned by a superior judge, and not otherwise, and to keep an account with such estate of all moneys received and paid to him; and the county treasurer must be allowed one per cent upon all moneys received and kept by him, and no greater fees for any services herein provided; and for the safe-keeping and payment of all such moneys, as herein provided, the said treasurer and his sureties are responsible upon his official bond.

INVESTMENT.—The moneys thus deposited may, upon

order of the court, be invested, pending the proceedings, in securities of the United States, or of this state, when such investment is deemed by the court to be for the best interests of the estate. After a final settlement of the affairs of any estate, if there are no heirs, or other claimants thereof, the county treasurer must pay into the state treasury all moneys and effects in his hands belonging to the estate, upon the order of the court; and if any such moneys and effects escheat to the state, they must be disposed of as other escheated estates. —*Kerr's Cyc. Code Civ. Proc.*, § 1737.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Idaho—Compiled Statutes of 1919, section 7787.

Montana—Revised Codes of 1907, section 3084.

§ 853. Not to be interested in payments, etc.

The public administrator must not be interested in the expenditures of any kind made on account of any estate he administers; nor must he be associated, in business or otherwise, with any one who is so interested, and he must attach to his report and publication, made in accordance with the preceding section, his affidavit to that effect.—*Kerr's Cyc. Code Civ. Proc.*, § 1738.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho—Compiled Statutes of 1919, section 7788.

Montana*—Revised Codes of 1907, section 3085.

Nevada—Revised Laws of 1912, section 1620.

§ 854. When to settle with county clerk. Disposition of unclaimed estate.

Public administrators are required to account, under oath, and to settle and adjust their accounts relating to the care and disbursement of money or property belonging to estates in their hands, with the county clerks of their respective counties, on the first Monday in January and July in each year; one copy of said account to be filed

with the papers in each of such estates; and they must pay to the county treasurer any money remaining in their hands of an estate unclaimed, as provided in sections sixteen hundred and ninety-three to sixteen hundred and ninety-six, both inclusive.—*Kerr's Cyc. Code Civ. Proc.*, § 1739.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Montana—Revised Codes of 1907, section 3086.

§ 855. Proceedings against, for failure to pay over money.

When it appears, from the returns made in pursuance of the foregoing sections, that any money remains in the hands of the public administrator (after a final settlement of the estate) unclaimed, which should be paid over to the county treasurer, the superior court, or a judge thereof, must order the same to be paid over to the county treasurer; and on failure of the public administrator to comply with the order within ten days after the same is made, the district attorney for the county must immediately institute the requisite legal proceedings against the public administrator for a judgment against him and the sureties on his official bond, in the amount of money so withheld, and costs.—*Kerr's Cyc. Code Civ. Proc.*, § 1740.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho*—Compiled Statutes of 1919, section 7789.

Montana*—Revised Codes of 1907, section 3087.

§ 856. Payment of fees of officers.

The fees of all officers chargeable to estates in the hands of public administrators must be paid out of the assets thereof, so soon as the same come into their hands.—*Kerr's Cyc. Code Civ. Proc.*, § 1741.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 3088.

§ 857. To administer oaths.

Public administrators may administer oaths in regard to all matters touching the discharge of their duties, or the administration of estates in their hands.—*Kerr's Cyc. Code Civ. Proc.*, § 1742.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 3089.

§ 858. Application of preceding chapters.

When no direction is given in this chapter for the government or guidance of a public administrator in the discharge of his duties, or for the administration of an estate in his hands, the provisions of the preceding chapters of this title must govern.—*Kerr's Cyc. Code Civ. Proc.*, § 1743.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho*—Compiled Statutes of 1919, section 7790.

Montana—Revised Codes of 1907, section 3091.

§ 859. To file reports. Penalty. Duty of district attorney.

Every public administrator, or person who holds letters of administration, who was appointed while acting as public administrator, who fails to comply with the provisions of sections seventeen hundred and thirty-five, seventeen hundred and thirty-six, and section seventeen hundred and thirty-nine of this code, is guilty of a misdemeanor; and upon conviction thereof, shall be punished by a fine not less than one hundred dollars for each offense; and it shall be the duty of the district attorney of the county to see that the provisions of this chapter are fully complied with.—*Kerr's Cyc. Code Civ. Proc.*, § 1744.

PUBLIC ADMINISTRATORS.

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| 1. Character of office. | (3) Can not contest probate of will. |
| 2. Right to letters. | (4) May contest another's right to administer. |
| (1) In general. | (5) Right to writ of prohibition. |
| (2) Competency. | (6) "Return" of condition of estate. |
| (3) Preference. | (7) Personal liability on contracts. |
| (4) Discretion of court. | |
| (5) In case of foreign will. | |
| (6) Conflict of jurisdiction. | |
| (7) Issuance of letters. | |
| 3. Oath and bond. | |
| 4. Powers, duties, and liabilities. | 5. Compensation. |
| (1) In general. | 6. Appeal. |
| (2) Duty as to state moneys, escheat, etc. | |

1. **Character of office.**—The public administrator is a county officer, and must perform the duties prescribed by law. If no specific direction is given for his government or guidance in the discharge of his duties, or for the administration of an estate in his hands, those provisions relating to administrators generally must govern. He obtains letters of administration, not as an individual, but as public administrator, by virtue of his office, whether such letters are issued to him upon his own application, or are issued to him by order of the court. The purpose of the law is to provide a public officer, acting under oath of office and an official bond, who shall be in a position, at all times, to administer an estate where there is a failure of heirs or other persons competent to perform the services.—*Los Angeles County v. Kellogg*, 146 Cal. 590, 80 Pac. 861. The right of the public administrator to administer upon an estate is a right attached to the officer as distinguished from the office. This is apparent from the fact that, upon the expiration of his term of office, if the estate be not finally closed, he continues as administrator of it.—*Estate of Lermond*, 142 Cal. 585, 586, 76 Pac. 488; *Los Angeles County v. Kellogg*, 146 Cal. 590, 80 Pac. 861, 863.

REFERENCES.

Concerning public administrators, see notes *Kerr's Cyc. Code Civ. Proc.*, §§ 1726-1744.

2. Right to letters.

(1) **In general.**—It is competent for the public administrator, as such, to petition for, and by the order of the probate court to receive, letters of administration upon the estate of an intestate.—*Estate of Morgan*, 53 Cal. 243, 244. The court exceeds its jurisdiction in appointing the public administrator as special administrator, and in ordering the estate of the decedent into the public administrator's charge, where one who is next of kin, and to whom the statute has given a prior right to the office of both general and special administrator, seeks such appointment.—*In re Ming*, 15 Mont. 79, 38 Pac. 228, 232. A public administrator of the county of a decedent's residence at the time of his death is entitled to letters of administration, al-

though the proceedings have been transferred to another county, and the public administrator of that county has also applied for letters.—Estate of Graves, 8 Cal. App. 254, 96 Pac. 792, 794. The public administrator has the right to administer, on the estate of an intestate, to the exclusion of everybody except a relative of the decedent, even the grantee of an heir or next of kin being so excluded.—Estate of Wise, 175 Cal. 196, 165 Pac. 531.

REFERENCES.

Right of public administrator to appointment in certain cases.—See note § 266, head-line 19, ante. That a corporation may be appointed to act as administrator.—See notes Kerr's Cyc. Code Civ. Proc., § 1348.

(2) Competency.—In appointing a public administrator to take charge of an estate, the court is not limited to the estates of such persons as die within his county, but he is competent to administer upon the estate within his county of any decedent irrespective of the place of death.—Estate of Hickman, 101 Cal. 609, 36 Pac. 118; Estate of Richardson, 120 Cal. 344, 347, 52 Pac. 832. A statute which provides that "the administrator must not be interested in the expenditures of any kind, made on account of any estate he administers," does not state a rule of disqualification, and does not render incompetent, as public administrator, one who became a creditor of the estate before his appointment, as by furnishing the coffin and burial outfit for the deceased.—Estate of Muersing, 103 Cal. 585, 587, 37 Pac. 520. If the term of office of a public administrator expires before the hearing of his petition for letters of administration, he is incompetent to administer upon the estate. It is his status at the time of the granting of his administration, and not at the time of filing his petition, that determines his competency.—Estate of Pingree, 100 Cal. 78, 81, 34 Pac. 521; but see Los Angeles County v. Kellogg, 146 Cal. 590, 80 Pac. 861, 863, that he retains his official character while acting under letters of appointment, so far as a particular estate is concerned, even though his term of office has expired.

(3) Preference.—A public administrator is entitled to letters of administration in preference to the nominee of a non-resident heir of an intestate decedent.—Hyde v. Cutler, 64 Cal. 228, 30 Pac. 804; Estate of Beech, 63 Cal. 458, 460. He is preferred to the nominee of a married daughter of the intestate.—Estate of Kelly, 57 Cal. 81, 82. He is also entitled to letters of administration in preference to creditors.—Hyde v. Cutler, 64 Cal. 228, 30 Pac. 804; Estate of McKinnon, 64 Cal. 226; and see Estate of Doak, 46 Cal. 573. If a public administrator, applies for letters of administration as a creditor, he is not thereby estopped from making an application therefor in his official capacity.—Estate of McKinnon, 64 Cal. 226, 227. Brothers of the decedent are entitled to letters of administration only when they are entitled to "succeed" to the estate or some portion thereof. Hence, their nominee, where such brothers are not entitled to administer on

the estate of the decedent, and who are merely devisees of the deceased mother, who was the sole heir of their deceased sister, is not entitled to letters of administration as against the public administrator.—Estate of Wakefield, 136 Cal. 110, 111, 68 Pac. 499. A public administrator is not entitled to letters of administration as against the guardian of an incompetent person, where such guardian was entitled, at the time of the death, to such letters.—Estate of McLaughlin, 103 Cal. 429, 37 Pac. 410. The public administrator is entitled to preference over the Italian consul general.—In re Ghio's Estate, 157 Cal. 552, 108 Pac. 516. Where a citizen of Italy resident in state dies intestate leaving property in said state, and all his heirs reside in Italy, consul general of Italy is not entitled to letters of preference to public administrator of county of decedent's residence, entitled by state laws to officiate in such cases, though Italian treaty with United States gives consul general all rights of same officers of most favored nation, and though United States treaty with Argentine Republic provides that consul general of either country "intervene in possession, administration, etc.," of intestate estates of citizens of such country dying in other, "conformable with laws of country" for benefit of creditors and heirs.—In re Ghio's Estate, 157 Cal. 552, 137 Am. St. Rep. 145, 37 L. R. A. (N.S.) 549, 108 Pac. 516. The treaty between the United States and the kingdom of Greece gives the Greek consul no right, paramount to that of the public administrator, to letters of administration of a subject of Greece dying intestate in this state.—Estate of Servas, 169 Cal. 240, Ann. Cas. 1916D, 233, 146 Pac. 651. A homestead selected by a married woman, becomes the property of her husband on her death, although selected from her separate property; and on his dying without known heirs, the public administrator, rather than the woman's brother is entitled to administer on the property.—Estate of Beers, 178 Cal. 54, 171 Pac. 1062.

(4) Discretion of court.—In a contest between certain creditors and a public administrator as to which shall administer, it is discretionary with the court to make the appointment.—Estate of Doak, 46 Cal. 573.

REFERENCES.

Discretion of court in case of foreign will.—See subd. (5), *infra*.

(5) In case of foreign will.—In the case of a foreign will the public administrator is not "entitled" to letters of administration. This rule is apparently based upon the fact that he is not "interested in the will."—Estate of Brundage, 141 Cal. 538, 541, 75 Pac. 175. Upon the admission to probate, in this state, of the copy of a will that has been admitted to probate in another jurisdiction, if there is no one here who is entitled to letters of administration, it is within the discretion of the court to appoint the public administrator.—Estate of Richardson, 120 Cal. 344, 346, 52 Pac. 832. On the probate of a foreign will in this state, in the absence of a petition by the executor named in the will, letters of administration must be granted

to the "person interested" in the will who applies for them, to the exclusion of the public administrator.—*Estate of Bergin*, 100 Cal. 376, 34 Pac. 867, 868; *Estate of Engle*, 124 Cal. 292, 56 Pac. 1022. If the devisee is "interested" in the will so far as to entitle him to letters of administration as against the public administrator, it follows that his assignee is likewise entitled to letters in preference to the public administrator.—*Estate of Engle*, 124 Cal. 292, 56 Pac. 1022, 1023. But where the person who is entitled to letters testamentary upon application therefor fails to make application, in the case of a foreign will, and there is no statutory provision requiring the court to appoint the nominee of the executor named in such will, or of any resident devisee, the court has jurisdiction to appoint the public administrator, instead of such nominee.—*Estate of Richardson*, 120 Cal. 344, 52 Pac. 832. If a foreign executor announces his right to letters testamentary in this state, and he is not the surviving husband or wife of the deceased, the public administrator, as between himself and the appointee of such foreign executor, has the prior right to be granted letters of administration with the will annexed.—*Estate of Garber*, 74 Cal. 338, 340, 16 Pac. 233.

(6) *Conflict of jurisdiction.*—Jurisdiction in the matter of the appointment of a public administrator attaches upon the filing of the first petition, where a non-resident has died leaving property in two or more countries, to the superior court in which the petition is filed, and continues during the pendency of the proceeding thus instituted; and this jurisdiction is exclusive, precluding any other court from effectually acting in the matter. Hence where a petition for appointment in such a case is filed in one superior court, an administrator subsequently appointed upon application in another superior court, is not a party in interest, entitled to oppose the appointment of the administrator in the county wherein jurisdiction first attached.—*Estate of Davis*, 149 Cal. 485, 487, 87 Pac. 17, 18. See, also, *Dungan v. Superior Court*, 149 Cal. 98, 117 Am. St. Rep. 119 84 Pac. 767.

(7) *Issuance of letters.*—After a grant of administration has been regularly made to a public administrator, there is no necessity for the actual issuance of letters to him, to authenticate his title, where he was duly authorized to administer by the judgment of a court having jurisdiction.—*Abel v. Love*, 17 Cal. 233, 238. If a person presents a petition, in his official character, for letters of administration, and his claim to such letters is based upon the fact that he is a public administrator, and the judge acts upon such petition, and it is that petition under which the petitioner is appointed, it must be held that the letters were issued to the petitioner in his official character as public administrator, and not to him personally.—*Mitchell v. Hecker*, 59 Cal. 558, 560. An order directing letters to be issued to one as public administrator upon his qualifying, in the manner provided by law, is only one step towards his appointment. It does not, of itself, vest him with the office. His appointment is in fieri until he has

qualified and received his letters. If it appears that he has never taken the oath of office, and that no letters were issued to him, no grant of administration is shown.—*Estate of Hamilton*, 34 Cal. 464, 469.

3. Oath and bond.—Where it is expressly declared by statute that the official bond and oath of the public administrator are in lieu of the administrator's bond and oath, it is not incumbent upon the court to require, in the first instance, upon application for letters of administration, or at all, a bond, in twice the amount of the value of the personal property of the estate.—*Healy v. Superior Court*, 127 Cal. 659, 662, 60 Pac. 428. Under the Kansas statute providing that, before a public administrator shall take charge of an estate, he shall make application to the probate court showing certain facts and shall give bond, and that the court shall thereupon issue him letters of administration, his appointment as administrator is not absolutely void by the omission of the application to set out some jurisdictional fact, where such fact actually exists.—*Cox v. Kansas City*, 86 Kan. 298, 120 Pac. 553.

4. Powers, duties, and liabilities.

(1) In general.—A public administrator has only such powers as are given him by law.—*Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237. He is not entitled to administer upon every estate, and must have a judicial grant of administration in every particular case of which his official commission is not proof. He must show the grant of administration like every other administrator.—*Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Rogers v. Hoberlein*, 11 Cal. 120, 128; *Estate of Hamilton*, 34 Cal. 464. A public administrator does not, by virtue of his office acquire the right to administer upon any particular estate. He can take upon himself the duties of an administrator of any given estate only by a special grant from the probate court, made upon a petition filed in the matter of such estate.—*Estate of Hamilton*, 34 Cal. 464, 468. He is competent to administer on the estate within his county, of any decedent, irrespective of the place of the latter's death.—*Estate of Richardson*, 120 Cal. 344, 347, 52 Pac. 832, 833. A man, who assumes to be a public administrator, but who does not give the official bond required by law, and who is not even under the sanction of an oath of office, but who undertakes the administration of the estate, and continues therein, and makes a sale of land thereof after the election of a public administrator, can not be said to represent the interest of the minors, in such a way as to raise the bar of the statute of limitations against them.—*Staples v. Connor*, 79 Cal. 14, 21 Pac. 380. No burden is imposed upon a public administrator of administering estates which have been transferred to his county by reason of the disqualification of the judge of a superior court of an adjoining county.—*Estate of Graves*, 8 Cal. App. 254, 96 Pac. 792, 794. The administration of an estate commenced by a public administrator, and not completed when his term of office expires, is to be completed by him, and does not devolve on his successor. His

authority to act continues until it is directly set aside, or is indirectly revoked by another appointment.—*In re Cragle's Estate*, 24 Mont. 37, 60 Pac. 495, 497; *Rogers v. Hoberlein*, 11 Cal. 120; and the sureties on his bond remain liable.—*Estate of Aveline*, 53 Cal. 259. If a public administrator succeeds himself in office, the sureties on his second official bond are not answerable for his acts as administrator of any estate he represented during his first term.—*O'Rourke v. Harper*, 35 Mont. 346, 89 Pac. 65, 66. The public administrator of one county is not authorized to petition for the revocation of letters issued to the public administrator of another county.—*Estate of Griffith*, 84 Cal. 107, 110, 23 Pac. 528, 24 Pac. 381.

(2) **Duty as to state moneys, escheats, etc.**—The public administrator is authorized to take charge of estates of persons dying intestate without known heirs. All persons are required to notify the public administrator of the existence of such estates; and the public administrator is required to administer upon such estates. He is required to keep the moneys of such estates on deposit in the county treasury, to pay them out only upon an order of the probate court and, after the final settlement, the balance shall be paid into the state treasury upon an order of the court, if there are no heirs or other claimants. In such estates, the public administrator is required to render his final account, and, upon the settlement of the final account, the probate court must proceed to distribute the estate. Such distribution is final, and must be made to the persons entitled thereto. After a final settlement of the affairs of any estate, if there are no heirs, or other claimants thereof, the county treasurer shall pay into the state treasury all moneys and effects in his hands belonging to the estate, upon order of the court; and, if any such moneys and effects escheat to the state, they must be disposed of as other escheated estates.—*Estate of Miner*, 143 Cal. 194, 202, 76 Pac. 968.

REFERENCES.

Duty of public administrator as to the state moneys, escheats, etc.—See *Kerr's Cyc. Code Civ. Proc.*, § 1737.

(3) **Can not contest probate of will.**—The public administrator is not interested in the estate in such a way as to enable him to contest the probate of a will. The probate of a will can be contested only upon "written grounds of opposition" filed by a "person interested," that is, interested in the estate, and not in the mere fees of an administration thereof. A public administrator has no interest in an estate, nor in the probate of a will. That is a matter which concerns only those to whom the estate would otherwise go.—*Estate of Sanborn*, 98 Cal. 103, 32 Pac. 865, 866; *Estate of Hickman*, 101 Cal. 609, 612, 36 Pac. 118; *State v. District Court*, 34 Mont. 226, 85 Pac. 1022.

(4) **May contest another's right to administer.**—The public administrator of one county is entitled to contest the right of another public administrator to administer upon an estate in the superior court of

the county of which the applicant is the public administrator, and the conflicting claims of the applicants must be determined by ascertaining the residence of the deceased at the time of his death.—*Estate of Graves*, 8 Cal. App. 254, 96 Pac. 792, 793.

(5) **Right to writ of prohibition.**—Where applications for letters of administration are made in different counties, upon conflicting claims as to the fact of residence, the superior court of the county in which a petition is first filed has exclusive jurisdiction to determine the question of residence and the courts of other counties must abide the determination of that court, which is reviewable only upon appeal. There can not be two valid administrations at the same time in this state. Hence where the public administrator and the next of kin of decedent have applied for letters of administration on the estate of a non-resident decedent, they have such an "interest" as to entitle them to maintain a proceeding for a writ of prohibition to prevent another court from assuming jurisdiction of the same estate.—*Dungan v. Superior Court*, 149 Cal. 98, 84 Pac. 767, 768, 769.

(6) **"Return" of condition of estate.**—Where the statute requires the public administrator to make and to publish, semi-annually, a "return" of the condition of all estates which have come into his hands, under oath, such "return" is not to be treated as an account stated. It is wholly different from the accounts required to be made by administrators, and for a wholly different purpose. It was not intended to, and does not, take the place or serve the purpose of the semi-annual accounts required of executors and administrators generally. The "return" is not made to the court; there is no hearing upon it; and no order of the court is required as to it. No heir is bound by it; nor does it conclusively establish any fact stated in it as against an heir.—*Estate of Hedrick*, 127 Cal. 184, 188, 59 Pac. 590.

(7) **Personal liability on contracts.**—Neither a state, county, town, nor city is liable on contracts made by the public administrator; and, although he is a public officer, he is personally liable upon contracts made in relation to estates upon which he administers, unless the idea of such personal liability be excluded by the contract.—*Dwinelle v. Henriquez*, 1 Cal. 387, 392. If a county attorney would collect fees for services rendered the public administrator he must show that he rendered the services.—*Estate of Murphy*, 171 Cal. 697, 154 Pac. 839.

5. **Compensation.**—In California, the provision of the County Government Act fixes the salary of the public administrator of a particular county, and, being a special act, it controls the general provision of the code; and the salary of such officer, in such county, is in full compensation for all services rendered by him. Where the statute requires him to pay all commissions allowed by the superior court into the county treasury, he can not, after the expiration of his term of office, retain fees allowed him for services. He must pay all commissions thereafter received into the county treasury. If he continues to ad-

minister upon the estate in his hands, after his term expires, he can not complain because his services are regarded as voluntary, and because he is denied special compensation therefor. If he knows that he is to have a successor, he may protect himself by asking the court, by an appropriate petition, to revoke his letters, and by resigning his appointment in estates remaining unadministered. He should state his accounts to the close of his term, and ask to be relieved of further performance of the trust. It would then be the duty of the court to settle his accounts, accept his resignation, revoke his letters, and direct his successor to take charge of the estate.—*Los Angeles County v. Kellogg*, 146 Cal. 590, 596, 80 Pac. 861. In California, public administrators, under express provision of the statute, shall receive the same compensation and allowances as are allowed to other administrators.—See *Kerr's Cyc. Code Civ. Proc.*, § 1618. A public administrator does not, by virtue of his office, or by filing a petition for letters of administration upon the estate of a decedent, acquire an interest in the estate, or in the commissions to be earned by administering upon it.—*Estate of McLaughlin*, 103 Cal. 429, 37 Pac. 410; *State v. Woody*, 20 Mont. 413, 51 Pac. 975. He is not, therefore, entitled to fees earned by his successor.—*State v. Woody*, 20 Mont. 413, 51 Pac. 975, 976. In Idaho, the county treasurer is ex officio public administrator, and all fees and compensation received by him in his official capacity, and as public administrator, must be accounted for and reported to his county, and can not be retained by him for his personal or individual use.—*Appeal of Rice*, 12 Ida. 305, 85 Pac. 1109. The general provision of the code that "such administrators shall receive the same compensation and allowances as are allowed in this title to other administrators" is controlled by a special act which makes the public administrator a salaried officer, and which fixes his compensation by a salary, and directs him to keep a book recording therein "all fees or compensation of whatever nature, kind, or description," and which also provides that he must pay monthly into the county treasury the fees allowed him in all cases, and which declares that his salary shall be in full compensation for all services.—*County of Los Angeles v. Kellogg*, 146 Cal. 590, 596, 80 Pac. 861.

6. *Appeal*.—If the application of a public administrator for letters of administration upon the estate of a deceased person is denied, and he moves for a new trial, and takes an appeal from an order denying his motion, and, pending such appeal, he resigns from the office, and another is appointed in his place, such other person can not be substituted, because the appeal abated with the resignation of the officer.—*Estate of Lermond*, 142 Cal. 585, 76 Pac. 488. The trial court's decision that a public administrator, who petitioned to be appointed administrator de bonis non of the estate of a deceased person, was incompetent and unfit to perform the duties required of him in administering the estate, was reversed, as not supported by the evidence.—*Estate of Bizzell*, 172 Cal. 486, 157 Pac. 237.

PART XV.

WILLS.

CHAPTER I.

EXECUTION AND REVOCATION OF WILLS.

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EXECUTION OF WILLS. REVOCATION. CLASSES.

I. Execution of Wills. Classes.

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| <ul style="list-style-type: none"> 1. Right of testamentary disposition. <ul style="list-style-type: none"> (1) In general. (2) Creation of statute. (3) Who may make will. (4) Testamentary nature of instrument. 2. Limitation of the right. <ul style="list-style-type: none"> (1) In general. (2) Special limitations by statute. (3) Limitation upon right as to certain persons. Indiana. (4) Same. Insane persons. (5) Same. Persons under guardianship. (6) Same. Married persons. (7) Paramount authority of probate court. (8) Right of wife to support as limiting testator's control. 3. Testamentary capacity. <ul style="list-style-type: none"> (1) In general. (2) As affected by age and physical infirmity. (3) As affected by fraud, undue influence, etc. (4) Evidence. (5) Insanity. (6) Delusions. (7) Exists when. 4. Formalities and execution. <ul style="list-style-type: none"> (1) In general. (2) Signature of testator. (3) Publication by testator. (4) Subscribing witnesses. (5) Attestation by witnesses. 5. Validity of wills. <ul style="list-style-type: none"> (1) In general. (2) Instruments informally executed. | <ul style="list-style-type: none"> 6. Codicils to wills. <ul style="list-style-type: none"> (1) In general. (2) Reference to the will. 7. Incorporating other papers by reference. 8. Wills in form of deeds. <ul style="list-style-type: none"> (1) In general. (2) Testamentary character of instrument. 9. Contract to make a will. <ul style="list-style-type: none"> (1) In general. (2) Implication from agreement. (3) Is not shown, when. (4) Oral contracts. (5) Mutual abandonment of contract. (6) Special contract. (7) Specific performance, when. (8) Same. When not. (9) Limitation of actions. 10. Escrow deed, when not a will. 11. Deed construed in aid of will. 12. Holographic wills. <ul style="list-style-type: none"> (1) In general. (2) Formalities in executing. (3) Holographic will by married woman. 13. Nuncupative wills. 14. Joint, mutual, or reciprocal wills. 15. Foreign wills. 16. Non-intervention wills. <ul style="list-style-type: none"> (1) In general. (2) Force of the statute. (3) Object of statute and policy of court. (4) Adjudication of solvency. (5) Jurisdiction of court. 17. Instruments construed not to be wills. 18. Will as evidence. |
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II. Revocation of Wills.

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| 1. Revocation. | 4. Revocation by subsequent will. |
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| (2) Contractual relation. | 6. Revocation by codicil. |
| (3) Manner of revocation. | 7. Revocation by marriage, etc. |
| 2. Facts and evidence relating to. | 8. Same. Effect of divorce. |
| 3. Revocation of devise. | 9. Same. Revocation of consent. |

§ 860. Who may make a will.

Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will is succeeded to as provided in title seven of this part, being chargeable in both cases with the payment of all the decedent's debts, as provided in the Code of Civil Procedure.—*Kerr's Cyc. Code Civ. Proc.*, § 1270.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 563.

Arizona—Revised Statutes of 1913, paragraph 1204.

Colorado—Mills's Statutes of 1912, section 7868; Laws of 1915, chapter 178, page 513 (and election by survivor where husband and wife wills more than one-half from the other).

Hawaii—Revised Laws of 1915, section 3258.

Idaho*—Compiled Statutes of 1919, section 7808.

Kansas—General Statutes of 1915, section 11752.

Montana*—Revised Codes of 1907, section 4723.

Nevada—Revised Laws of 1912, section 6202.

New Mexico—Statutes of 1915, section 5857.

North Dakota*—Compiled Laws of 1913, section 5640.

Oklahoma*—Revised Laws of 1910, section 8338.

Oregon—Lord's Oregon Laws, sections 7316, 7317; as amended by Laws of 1917, chapter 331, page 687.

South Dakota*—Compiled Laws of 1913, section 3305.

Utah—Compiled Laws of 1907, section 2731.

Washington—Laws of 1917, chapter 156, page 649, section 24.

Wyoming—Compiled Statutes of 1910, section 5394; as amended and re-enacted by Laws of 1915, chapter 149, page 230.

§ 860.¹ Consent to dispose of community property by will.

NOTE.—This section, 1271, added to the Civil Code, was a part of chapter 611 of the Statutes and Amendments of 1919, and was inadvertently printed herein when this book went to press, it having been at that time suspended from going into effect by the referendum pro-

visions of the state constitution. It was defeated at the general election held on November 2, 1920, and of course is not given herein, though the headline has been preserved to show the nature of the contemplated law.

§ 861. Will, or part thereof, procured by fraud.

A will, or part of a will, procured to be made by duress, menace, fraud, or undue influence, may be denied probate; and a revocation, procured by the same means, may be declared void.—*Kerr's Cyc. Civ. Code*, § 1272.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4724.

North Dakota*—Compiled Laws of 1913, section 5642.

Oklahoma*—Revised Laws of 1910, section 8340.

South Dakota*—Compiled Laws of 1913, section 3307.

Utah*—Compiled Laws of 1907, section 2732.

§ 862. Will by married woman.

A married woman may dispose of all her separate estate by will, without the consent of her husband, and may alter or revoke the will in like manner as if she were single. Her will must be executed and proved in like manner as other wills.—*Kerr's Cyc. Civ. Code*, § 1273.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Hawaii—Revised Laws of 1915, section 3259.

Idaho*—Compiled Statutes of 1919, section 7809.

Nevada—Revised Laws of 1912, section 6203.

North Dakota—Compiled Laws of 1913, section 5641.

Oklahoma*—Revised Laws of 1910, section 8339.

Oregon—Lord's Oregon Laws, section 7318; as amended by Laws of 1917, chapter 331, page 687.

South Dakota*—Compiled Laws of 1913, section 3306.

Utah*—Compiled Laws of 1907, section 2733.

§ 863. What may pass by will.

Every estate and interest in real or personal property, to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will, except as otherwise pro-

vided in sections fourteen hundred and one and fourteen hundred and two.—*Kerr's Cyc. Civ. Code*, § 1274.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona—Revised Statutes of 1913, paragraph 1205.

North Dakota—Compiled Laws of 1913, section 5643.

Oklahoma—Revised Laws of 1910, section 8341.

South Dakota—Compiled Laws of 1913, section 3308.

§ 864. Who may take by will.

A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except that corporations other than counties, municipal corporations, and corporations formed for scientific, literary, or solely educational or hospital purposes, can not take under a will, unless expressly authorized by statute; subject, however, to the provisions of section thirteen hundred and thirteen.—*Kerr's Cyc. Civ. Code*, § 1275.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Montana—Revised Codes of 1907, section 4725.

North Dakota—Compiled Laws of 1913, section 5644.

Oklahoma—Revised Laws of 1910, section 8342.

South Dakota—Compiled Laws of 1913, section 3309.

Utah—Compiled Laws of 1907, section 2734.

Wyoming—Laws of 1915, chapter 34, page 29.

§ 865. Written will, how to be executed.

Every will, other than a nuncupative will, must be in writing; and every will, other than an olographic [olographic] will, and a nuncupative will, must be executed and attested as follows:

1. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto;
2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority;

3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and,

4. There must be two attesting witnesses, each of whom must sign the same as a witness, at the end of the will, at the testator's request and in his presence.—*Kerr's Cyc. Civ. Code*, § 1276.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 564; as amended by Laws of 1915, chapter 4, page 4.

Arizona—Revised Statutes of 1913, paragraph 1206.

Colorado—Mills's Statutes of 1912, section 7869.

Hawaii—Revised Laws of 1915, section 3260.

Idaho*—Compiled Statutes of 1919, section 7810.

Kansas—General Statutes of 1915, section 11753.

Montana*—Revised Codes of 1907, section 4726.

Nevada—Revised Laws of 1912, section 6204.

New Mexico—Statutes of 1915, sections 5862, 5866.

North Dakota*—Compiled Laws of 1913, section 5649.

Oklahoma—Revised Laws of 1910, sections 8347, 8348.

Oregon—Lord's Oregon Laws, section 7319.

South Dakota—Compiled Laws of 1913, section 3313.

Utah—Compiled Laws of 1907, section 2735.

Washington—Laws of 1917, chapter 156, page 649, sections 25, 27.

Wyoming—Compiled Statutes of 1910, section 5397.

§ 866. Form. Will.

I —, of the county ¹ of —, state of —, being of sound mind and memory, do hereby make, publish, and declare this, my last will, in manner and form as follows, that is to say:

First. I direct the payment of all my just debts and funeral expenses.²

Second. I give, devise, and bequeath all the property, real and personal, of whatsoever kind the same may be, or wheresoever situated, of which I may die possessed, or to which I may be entitled, to —,³ to have and to hold the same to the said —, —⁴ assigns forever.

Third. I nominate and appoint — executrix ⁵ of this

my last will and testament, and I hereby revoke any and all former wills by me made.

In witness whereof, I have hereunto set my hand and seal this — day of —, 19—. —, [Seal]

The foregoing instrument consisting of — () pages, besides this,⁶ was, at the date hereof, by the said —, signed, sealed, and published as, and declared to be, his last will and testament, in presence of us, who, at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

—, residing at —.

—, residing at —.

Explanatory notes.—1 Or, city and county. 2 And other directions, if any. 3 Name the devisee, "say beloved wife," or other person. 4 Her or his. 5 Or, executor. 6 As a precautionary measure, the testator's name should be subscribed to each page of the will, to prevent alterations, that might easily be made in typewritten wills. For a crude paper held to be a valid will: See 68 Am. St. Rep. 874, 875.

§ 867. Definition of a holographic will.

A holographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed.—*Kerr's Cyc. Civ. Code*, § 1277.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona—Revised Statutes of 1913, paragraph 1207.

Idaho—Compiled Statutes of 1919, section 7811.

Montana*—Revised Codes of 1907, section 4727.

Nevada*—Revised Laws of 1912, section 6224.

North Dakota*—Compiled Laws of 1913, section 5648.

Oklahoma—Revised Laws of 1910, sections 8347, 8348.

South Dakota—Compiled Laws of 1913, section 3313.

Utah—Compiled Laws of 1907, section 2736.

§ 868. Witness to add residence.

A witness to a written will must write, with his name, his place of residence; and a person who subscribes the

testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will.—*Kerr's Cyc. Civ. Code*, § 1278.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho*—Compiled Statutes of 1919, section 7812.

Montana*—Revised Codes of 1907, section 4728.

North Dakota*—Compiled Laws of 1913, section 5651.

Oklahoma*—Revised Laws of 1910, section 8349.

Oregon—Lord's Oregon Laws, section 7320.

South Dakota*—Compiled Laws of 1913, section 3315.

Utah—Compiled Laws of 1907, section 2737.

§ 869. Mutual will.

A conjoint or mutual will is valid, but it may be revoked by any of the testators, in like manner with any other will.—*Kerr's Cyc. Civ. Code*, § 1279.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4729.

North Dakota*—Compiled Laws of 1913, section 5646.

Oklahoma*—Revised Laws of 1910, section 8345.

South Dakota*—Compiled Laws of 1913, section 3311.

Utah*—Compiled Laws of 1907, section 2738.

§ 870. Competency of subscribing witness.

If the subscribing witnesses to a will are competent at the time of attesting its execution, their subsequent incompetency, from whatever cause it may arise, does not prevent the probate and allowance of the will, if it is otherwise satisfactorily proved.—*Kerr's Cyc. Civ. Code*, § 1280.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Hawaii*—Revised Laws of 1915, section 3261.

Idaho*—Compiled Statutes of 1919, section 7813.

Montana*—Revised Codes of 1907, section 4730.

North Dakota*—Compiled Laws of 1913, section 5682.

Oklahoma*—Revised Laws of 1910, section 8379.

South Dakota*—Compiled Laws of 1913, section 3341.

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Utah*—Compiled Laws of 1907, section 2739.

Washington—Laws of 1917, chapter 156, page 652, section 38.

Wyoming—Compiled Statutes of 1910, section 5397.

§ 871. Conditional will.

A will, the validity of which is made by its own terms conditional, may be denied probate, according to the event, with reference to the condition.—*Kerr's Cyc. Civ. Code*, § 1281.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4731.

North Dakota*—Compiled Laws of 1913, section 5647.

Oklahoma*—Revised Laws of 1910, section 8346.

South Dakota*—Compiled Laws of 1913, section 3312.

Utah*—Compiled Laws of 1907, section 2741.

§ 872. Gifts to subscribing witnesses are void. Creditor is a competent witness.

All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing witness thereto, are void, unless there are two other competent subscribing witnesses to the same; but a mere charge on the estate of the testator for the payment of debts does not prevent his creditors from being competent witnesses to his will.—*Kerr's Cyc. Civ. Code*, § 1282.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 579.

Arizona—Revised Statutes of 1913, paragraph 1219.

Colorado—Mills's Statutes of 1912, sections 7872, 7873.

Hawaii*—Revised Laws of 1915, section 3262.

Kansas—General Statutes of 1915, section 11763.

Montana*—Revised Codes of 1907, section 4732.

Nevada*—Revised Laws of 1912, section 6205.

New Mexico—Statutes of 1915, section 5865.

North Dakota*—Compiled Laws of 1913, section 5680.

Oklahoma*—Revised Laws of 1910, section 8377.

Oregon—Lord's Oregon Laws, sections 7335, 7337, 7338.

South Dakota*—Compiled Laws of 1913, section 3339.

Utah*—Compiled Laws of 1907, section 2742.

Washington—Laws of 1917, chapter 156, page 652, section 38.

Wyoming—Compiled Statutes of 1910, section 5397.

§ 873. Witness, who is a devisee, is entitled to share to amount of devise, when.

If a witness, to whom any beneficial devise, legacy, or gift, void by the preceding section, is made, would have been entitled to any share of the estate of the testator, in case the will should not be established, he succeeds to so much of the share as would be distributed to him, not exceeding the devise or bequest made to him in the will, and he may recover the same of the other devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them.—*Kerr's Cyc. Civ. Code*, § 1283.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska—Compiled Laws of 1913, section 580.
- Arizona*—Revised Statutes of 1913, paragraph 1219.
- Colorado—Mills's Statutes of 1912, section 7872.
- Hawaii*—Revised Laws of 1915, section 3263.
- Kansas—General Statutes of 1915, section 11763.
- Montana*—Revised Codes of 1907, section 4733.
- North Dakota*—Compiled Laws of 1913, section 5681.
- Oklahoma*—Revised Laws of 1910, section 8378.
- Oregon—Lord's Oregon Laws, section 7336.
- South Dakota*—Compiled Laws of 1913, section 3340.
- Utah*—Compiled Laws of 1907, section 2743.
- Washington—Laws of 1917, chapter 156, page 652, section 38.
- Wyoming—Compiled Statutes of 1910, section 5397.

§ 874. Will made out of state, validity of.

No will made out of this state is valid as a will in this state, unless executed according to the provisions of this chapter, except that a will made in a state or country in which the testator is domiciled at the time of his death, and valid as a will under the laws of such state or country, is valid in this state so far as the same relates to personal property, subject, however, to the provisions of section thirteen hundred and thirteen.—*Kerr's Cyc. Civ. Code*, § 1285.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 576; Laws of 1913, chapter 61, page 155.

Kansas—General Statutes of 1915, section 9786.

Montana—Revised Codes of 1907, sections 4734, 4816.

Nevada—Laws of 1915, chapter 36, page 36.

New Mexico—Statutes of 1915, section 5858.

North Dakota—Compiled Laws of 1913, sections 5653-5655.

Oklahoma—Revised Laws of 1910, sections 8351, 8352, 8336.

Oregon—Lord's Oregon Laws, section 7332.

South Dakota—Compiled Laws of 1913, section 3316.

Utah—Compiled Laws of 1907, section 2744.

Washington—Laws of 1917, chapter 156, page 649, section 25.

§ 875. Republication by codicil.

The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil.—*Kerr's Cyc. Civ. Code*, § 1287.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4736.

North Dakota*—Compiled Laws of 1913, section 5652.

Oklahoma*—Revised Laws of 1910, section 8350.

South Dakota*—Compiled Laws of 1913, section 3316.

Utah*—Compiled Laws of 1907, section 2745.

§ 876. Nuncupative will, how to be executed.

A nuncupative will is not required to be in writing, nor to be declared or attested with any formalities.—*Kerr's Cyc. Civ. Code*, § 1288.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 573.

Kansas—General Statutes of 1915, section 11825.

Montana*—Revised Codes of 1907, section 4737.

New Mexico—Statutes of 1915, section 5861.

North Dakota*—Compiled Laws of 1913, section 5650.

Oklahoma*—Revised Laws of 1910, section 8344.

South Dakota*—Compiled Laws of 1913, section 3314.

Utah*—Compiled Laws of 1907, section 2746.

Washington—Laws of 1917, chapter 156, page 651, section 36.

§ 877. Nuncupative will, requisites of.

To make a nuncupative will valid, and to entitle it to be admitted to probate, the following requisites must be observed:

1. The estate bequeathed must not exceed in value the sum of one thousand dollars.

2. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator, at the time, to bear witness that such was his will, or to that effect.

3. The decedent must, at the time, have been in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear, or peril of death, or the decedent must have been, at the time, in expectation of immediate death from an injury received the same day.—*Kerr's Cyc. Civ. Code*, § 1289.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 573.

Arizona—Revised Statutes of 1913, paragraphs 1209, 1210.

Kansas—General Statutes of 1915, section 9846.

Montana*—Revised Codes of 1907, section 4738.

Nevada—Revised Laws of 1912, section 6206.

New Mexico—Statutes of 1915, section 5864.

North Dakota*—Compiled Laws of 1913, section 5645.

Oklahoma*—Revised Laws of 1910, section 8343.

Oregon—Lord's Oregon Laws, section 7330.

South Dakota*—Compiled Laws of 1913, section 3310.

Utah*—Compiled Laws of 1907, section 2747.

Washington—Laws of 1917, chapter 156, page 651, section 136.

§ 878. Nuncupative will, receiving proof of.

No proof must be received of any nuncupative will, unless it is offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, were reduced to writing within thirty days after they were spoken.—*Kerr's Cyc. Civ. Code*, § 1290.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 574.

Arizona—Revised Statutes of 1913, paragraph 1212.

Kansas—General Statutes of 1915, sections 9846, 9847.

Montana*—Revised Codes of 1907, section 4739.

Nevada—Revised Laws of 1912, section 6207.

Oregon—Lord's Oregon Laws, section 7330.

Utah*—Compiled Laws of 1907, section 2748.

Washington—Laws of 1917, chapter 156, page 652, section 37.

§ 879. Nuncupative will, granting probate of.

No probate of any nuncupative will must be granted for fourteen days after the death of the testator, nor must any nuncupative will be at any time proved, unless the testamentary words, or the substance thereof, be first committed to writing, and process issued to call in the widow, or other persons interested, to contest the probate of such will, if they think proper.—*Kerr's Cyc. Civ. Code*, § 1291.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 575.

Arizona—Revised Statutes of 1913, paragraph 1211.

Montana*—Revised Codes of 1907, section 4740.

Nevada—Revised Laws of 1912, section 6208.

Oregon*—Lord's Oregon Laws, section 7331.

Washington—Laws of 1917, chapter 156, page 652, section 37.

§ 880. Written will, how revoked.

Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or,

2. By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in

his presence and by his direction.—*Kerr's Cyc. Civ. Code*, § 1292.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska—Compiled Laws of 1913, section 593.
- Arizona—Revised Statutes of 1913, paragraph 1208.
- Colorado—Mills's Statutes of 1912, section 7870.
- Hawaii—Revised Laws of 1915, section 3264.
- Idaho*—Compiled Statutes of 1919, section 7814.
- Kansas—General Statutes of 1915, section 11793.
- Montana*—Revised Codes of 1907, section 4741.
- Nevada—Revised Laws of 1912, section 6209.
- New Mexico—Statutes of 1915, section 5867.
- North Dakota*—Compiled Laws of 1913, section 5663.
- Oklahoma*—Revised Laws of 1910, section 8358.
- South Dakota*—Compiled Laws of 1913, section 3324.
- Utah*—Compiled Laws of 1907, section 2749.
- Washington—Laws of 1917, chapter 156, page 650, sections 28, 44.
- Wyoming—Compiled Statutes of 1910, section 5398.

§ 881. Evidence of revocation.

When a will is canceled or destroyed by any other person than the testator, the direction of the testator, and the fact of such injury or destruction, must be proved by two witnesses.—*Kerr's Cyc. Civ. Code*, § 1293.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska—Compiled Laws of 1913, section 593.
- Idaho*—Compiled Statutes of 1919, section 7815.
- Kansas—General Statutes of 1915, section 11793.
- Montana*—Revised Codes of 1907, section 4742.
- North Dakota*—Compiled Laws of 1913, section 5661.
- Oklahoma*—Revised Laws of 1910, section 8359.
- South Dakota*—Compiled Laws of 1913, section 3325.
- Utah*—Compiled Laws of 1907, section 2750.

§ 882. Revocation of duplicate.

The revocation of a will, executed in duplicate, may be made by revoking one of the duplicates.—*Kerr's Cyc. Civ. Code*, § 1295.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Idaho*—Compiled Statutes of 1919, section 7816.
- Montana*—Revised Codes of 1907, section 4743.

North Dakota*—Compiled Laws of 1913, section 5663.
 Oklahoma*—Revised Laws of 1910, section 8361.
 South Dakota*—Compiled Laws of 1913, section 3327.
 Utah*—Compiled Laws of 1907, section 2751.

§ 883. Revocation by subsequent will.

A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will.—*Kerr's Cyc. Civ. Code*, § 1296.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 593.
 Hawaii—Revised Laws of 1915, section 3264.
 Montana*—Revised Codes of 1907, section 4744.
 New Mexico—Statutes of 1915, section 5867.
 North Dakota*—Compiled Laws of 1913, section 5664.
 Oklahoma*—Revised Laws of 1910, section 8362.
 South Dakota*—Compiled Laws of 1913, section 3328.
 Utah*—Compiled Laws of 1907, section 2752.
 Washington—Laws of 1917, chapter 156, page 650, section 28.

§ 884. Antecedent, not revived by revocation of subsequent will.

If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation, or revocation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancellation, or revocation, the first will is duly republished.—*Kerr's Cyc. Civ. Code*, § 1297.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 572.
 Hawaii—Revised Laws of 1915, section 3265.
 Idaho*—Compiled Statutes of 1919, section 7817.
 Montana*—Revised Codes of 1907, section 4745.
 Nevada*—Revised Laws of 1912, section 6210.

New Mexico—Statutes of 1915, section 5865.

North Dakota*—Compiled Laws of 1913, section 5665.

Oklahoma—Revised Laws of 1910, section 8363.

Oregon—Lord's Oregon Laws, section 7328.

South Dakota*—Compiled Laws of 1913, section 3329.

Utah*—Compiled Laws of 1907, section 2753.

Washington—Laws of 1917, chapter 156, page 651, section 35.

§ 885. Revocation by marriage and birth of issue.

If, after having made a will, the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received.—*Kerr's Cyc. Civ. Code*, § 1298.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 565.

Hawaii—Revised Laws of 1915, section 3266.

Idaho*—Compiled Statutes of 1919, section 7818.

Montana*—Revised Codes of 1907, section 4746.

North Dakota*—Compiled Laws of 1913, section 5666.

Oklahoma—Revised Laws of 1910, section 8364.

Oregon—Lord's Oregon Laws, section 7321.

South Dakota*—Compiled Laws of 1913, section 3320.

Washington—Laws of 1917, chapter 156, page 650, section 29.

§ 886. Effect of marriage of a man on his will.

If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received.—*Kerr's Cyc. Civ. Code*, § 1299.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, sections 565, 566.

Idaho*—Compiled Statutes of 1919, section 7819.

Montana*—Revised Codes of 1907, section 4747.

Nevada—Revised Laws of 1912, section 6211.

North Dakota*—Compiled Laws of 1913, section 5667.

Oklahoma—Revised Laws of 1910, section 8364.

South Dakota—Compiled Laws of 1913, section 3330.

Utah—Compiled Laws of 1907, section 2754.

Washington—Laws of 1917, chapter 156, page 650, section 29.

§ 887. Effect of marriage of a woman on her will.

If, after making a will, the testatrix marries, and the husband survives the testatrix, the will is revoked, unless provision has been made for him by marriage contract, or unless he is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received.—*Kerr's Cyc. Civ. Code*, § 1300.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 566.

Hawaii*—Revised Laws of 1915, section 3267.

Idaho—Compiled Statutes of 1919, section 7820.

Montana—Revised Codes of 1907, section 4748.

Nevada—Revised Laws of 1912, section 6212.

North Dakota*—Compiled Laws of 1913, section 5668.

Oklahoma*—Revised Laws of 1910, section 8365.

Oregon—Lord's Oregon Laws, section 7322.

South Dakota*—Compiled Laws of 1913, section 3331.

Washington—Laws of 1917, chapter 156, page 650, section 29.

§ 887.¹ Revocation of woman's will by marriage and birth of issue.

If, after making a will, the testatrix marries, and has issue of said marriage, born either in her lifetime or after her death, and the husband or issue survives her, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as

to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received.—*Kerr's Cyc. Civ. Code*, § 1300a.

§ 888. Contract of sale not a revocation.

An agreement made by a testator, for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession.—*Kerr's Cyc. Civ. Code*, § 1301.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 567.

Idaho*—Compiled Statutes of 1919, section 7821.

Kansas—General Statutes of 1915, section 11786.

Montana*—Revised Codes of 1907, section 4749.

Nevada—Revised Laws of 1912, section 6213.

North Dakota*—Compiled Laws of 1913, section 5669.

Oklahoma*—Revised Laws of 1910, section 8366.

Oregon—Lord's Oregon Laws, section 7322.

South Dakota*—Compiled Laws of 1913, section 3332.

Utah*—Compiled Laws of 1907, section 2755.

Washington—Laws of 1917, chapter 156, page 650, section 30.

§ 889. Mortgage not a revocation of will.

A charge or incumbrance upon any estate, for the purpose of securing the payment of money or the performance of any covenant or agreement, is not a revocation of any will relating to the same estate which was previously executed; but the devise and legacies therein contained must pass, subject to such charge or incumbrance.—*Kerr's Cyc. Civ. Code*, § 1302.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska*—Compiled Laws of 1913, section 568.

Idaho*—Compiled Statutes of 1919, section 7822.

Kansas*—General Statutes of 1915, section 11787.

Montana*—Revised Codes of 1907, section 4750.

Nevada*—Revised Laws of 1912, section 6214.

North Dakota*—Compiled Laws of 1913, section 5670.

Oklahoma*—Revised Laws of 1910, section 8367.

Oregon—Lord's Oregon Laws, section 7324.

South Dakota*—Compiled Laws of 1913, section 3333.

Utah*—Compiled Laws of 1907, section 2756.

Washington—Laws of 1917, chapter 156, page 650, section 31.

§ 890. Conveyance, when not a revocation.

A conveyance, settlement, or other act of a testator, by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession.—*Kerr's Cyc. Civ. Code*, § 1303.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 587.

Idaho*—Compiled Statutes of 1919, section 7823.

Kansas—General Statutes of 1915, section 11788.

Montana*—Revised Codes of 1907, section 4751.

North Dakota*—Compiled Laws of 1913, section 5671.

Oklahoma*—Revised Laws of 1910, section 8368.

Oregon—Lord's Oregon Laws, section 7344.

South Dakota*—Compiled Laws of 1913, section 3334.

Utah*—Compiled Laws of 1907, section 2757.

§ 891. Conveyance, when a revocation.

If the instrument by which an alteration is made in the testator's interest in a thing previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect.—*Kerr's Cyc. Civ. Code*, § 1304.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho*—Compiled Statutes of 1919, section 7824.

Kansas—General Statutes of 1915, section 11789.

Montana*—Revised Codes of 1907, section 4752.

North Dakota*—Compiled Laws of 1913, section 5672.

Oklahoma*—Revised Laws of 1910, section 8369.

South Dakota*—Compiled Laws of 1913, section 3335.

Utah*—Compiled Laws of 1907, section 2758.

§ 892. Revocation of codicils.

The revocation of a will revokes all its codicils.—*Kerr's Cyc. Civ. Code*, § 1305.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho*—Compiled Statutes of 1919, section 7825.

Montana*—Revised Codes of 1907, section 4753.

North Dakota*—Compiled Laws of 1913, section 5673.

Oklahoma*—Revised Laws of 1910, section 8370.

South Dakota*—Compiled Laws of 1913, section 3336.

Utah*—Compiled Laws of 1907, section 2759.

Washington—Laws of 1917, chapter 156, pages 650, 653, sections 28, 44.

§ 893. After-born child, unprovided for, to succeed.

Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate. But such succession does not impair or affect the validity of any sale of property made by authority of such will in accordance with the provisions of section fifteen hundred and sixty-one of the Code of Civil Procedure.—*Kerr's Cyc. Civ. Code*, § 1306.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 569.

Arizona—Revised Statutes of 1913, paragraph 1215.

Colorado—Mills's Statutes of 1912, section 7871.

Idaho—Compiled Statutes of 1919, section 7826.

Kansas—General Statutes of 1915, sections 11792, 11795.

Montana—Revised Codes of 1907, section 4754.

Nevada—Revised Laws of 1912, section 6215.

New Mexico—Statutes of 1915, section 5870.

North Dakota—Compiled Laws of 1913, section 5674.

Oklahoma—Revised Laws of 1910, section 8371.

Oregon—Lord's Oregon Laws, section 7325.

South Dakota—Compiled Laws of 1913, section 3337.

Utah—Compiled Laws of 1907, section 2760.

Washington—Laws of 1917, chapter 156, page 651, section 32.

§ 894. Children, or issue of children, unprovided for, to succeed.

When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, has the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section. But such succession does not impair or affect the validity of any sale of property made by authority of such will in accordance with the provisions of section fifteen hundred and sixty-one of the Code of Civil Procedure.—*Kerr's Cyc. Civ. Code*, § 1307.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 569.

Arizona—Revised Statutes of 1913, section 1215.

Idaho—Compiled Statutes of 1919, section 7827.

Kansas—General Statutes of 1915, sections 11792, 11795.

Montana—Revised Codes of 1907, section 4755.

Nevada—Revised Laws of 1912, section 6216.

New Mexico—Statutes of 1915, section 5870.

North Dakota—Compiled Laws of 1913, section 5675.

Oklahoma—Revised Laws of 1910, section 8372.

Oregon—Lord's Oregon Laws, section 7325.

South Dakota—Compiled Laws of 1913, section 3337.

Utah—Compiled Laws of 1907, section 2761.

Washington—Laws of 1917, chapter 156, page 651, section 32.

**§ 895. Share of after-born child to be taken from what estate.
Apportionment.**

When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child,

or the issue of a child, omitted in the will, as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy, or provision, may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.—*Kerr's Cyc. Civ. Code*, § 1308.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska—Compiled Laws of 1913, section 569.
- Idaho*—Compiled Statutes of 1919, section 7828.
- Kansas—General Statutes of 1915, section 11795.
- Montana*—Revised Codes of 1907, section 4756.
- Nevada*—Revised Laws of 1912, section 6217.
- North Dakota*—Compiled Laws of 1913, section 5676.
- Oklahoma*—Revised Laws of 1910, section 8373.
- Oregon—Lord's Oregon Laws, section 7325.
- South Dakota—Compiled Laws of 1913, section 3337.
- Utah*—Compiled Laws of 1907, section 2762.
- Washington—Laws of 1917, chapter 156, page 651, section 32.

§ 896. Advancement during lifetime of testator.

If such children, or their descendants, so unprovided for, had an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they take nothing in virtue of the provisions of the three preceding sections.—*Kerr's Cyc. Civ. Code*, § 1309.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska—Compiled Laws of 1913, section 570.
- Idaho*—Compiled Statutes of 1919, section 7829.
- Kansas—General Statutes of 1915, section 11796.
- Montana*—Revised Codes of 1907, section 4757.
- Nevada*—Revised Laws of 1912, section 6218.

North Dakota—Compiled Laws of 1913, section 5677.

Oklahoma*—Revised Laws of 1910, section 8374.

Oregon—Lord's Oregon Laws, section 7326.

South Dakota—Compiled Laws of 1913, section 3337.

Utah*—Compiled Laws of 1907, section 2763.

Washington—Laws of 1917, chapter 156, page 651, section 33.

§ 897. On death of devisee or legatee, before testator, lineal descendants take estate.

When any estate is devised or bequeathed to any child, or other relation of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee or legatee would have done had he survived the testator.—*Kerr's Cyc. Civ. Code*, § 1310.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 571.

Arizona—Revised Statutes of 1913, paragraph 1218.

Colorado—Mills's Statutes of 1912, section 7875.

Idaho—Compiled Statutes of 1919, section 7830.

Kansas—General Statutes of 1915, section 11811.

Montana—Revised Codes of 1907, section 4758.

Nevada*—Revised Laws of 1912, section 6219.

North Dakota*—Compiled Laws of 1913, section 5679.

Oklahoma—Revised Laws of 1910, section 8376.

Oregon—Lord's Oregon Laws, section 7327.

South Dakota—Compiled Laws of 1913, section 3338.

Utah*—Compiled Laws of 1907, section 2764.

Washington—Laws of 1917, chapter 156, page 651, section 34.

§ 898. Devises of land, how construed.

Every devise of land in any will conveys all the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate.—*Kerr's Cyc. Civ. Code*, § 1311.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 587.

Idaho*—Compiled Statutes of 1919, section 7831.

Kansas*—General Statutes of 1915, section 11810.

Montana*—Revised Codes of 1907, section 4759.
 Nevada*—Revised Laws of 1912, section 6220.
 North Dakota*—Compiled Laws of 1913, section 5678.
 Oklahoma*—Revised Laws of 1910, section 8375.
 Oregon—Lord's Oregon Laws, section 7344.
 South Dakota—Compiled Laws of 1913, section 3337.
 Utah*—Compiled Laws of 1907, section 2765.
 Washington—Laws of 1917, chapter 156, page 652, section 39.
 Wyoming*—Compiled Statutes of 1910, section 5395.

§ 899. Wills pass estate subsequently acquired.

Any estate, right, or interest in lands acquired by the testator after the making of his will, passes thereby and in like manner as if title thereto was vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator. Every will made in express terms, devising, or in any other terms denoting the intent of the testator to devise all the real estate of such testator, passes all the real estate which such testator was entitled to devise at the time of his decease.—*Kerr's Cyc. Civ. Code*, § 1312.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 587.
 Idaho*—Compiled Statutes of 1919, section 7832.
 Kansas—General Statutes of 1915, section 11809.
 Montana*—Revised Codes of 1907, section 4760.
 Nevada—Revised Laws of 1912, section 6221.
 North Dakota*—Compiled Laws of 1913, section 5684.
 Oklahoma*—Revised Laws of 1910, section 8380.
 Oregon—Lord's Oregon Laws, section 7344.
 South Dakota*—Compiled Laws of 1913, section 3342.
 Utah*—Compiled Laws of 1907, section 2766.
 Washington—Laws of 1917, chapter 156, page 653, section 41.
 Wyoming—Compiled Statutes of 1910, section 5396.

§ 900. Restriction on bequests or devises for charitable uses.

No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at

least thirty days before the decease of the testator; and if so made at least thirty days prior to such death, such devise or legacy and each of them shall be valid; provided, that no such devise or bequest shall collectively exceed one-third of the estate of the testator, leaving legal heirs, and in such case a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law; and provided, further, that bequests and devises to the state, or to any state institution, or for the use or benefit of the state or any state institution, or to any educational institution which is exempt from taxation under section one a of article thirteen of the constitution of the state of California, or for the use or benefit of any such educational institution, are excepted from the restrictions of this section; provided, however, that nothing in this section contained shall apply to bequests or devises made by will executed at least six months prior to the death of a testator who leaves no parent, husband, wife, child or grandchild, or when all of such heirs shall have by writing, executed at least six months prior to his death, waived the restrictions contained herein.—*Kerr's Cyc. Civ. Code*, § 1313.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Idaho—Compiled Statutes of 1919, section 7833.

Montana—Revised Codes of 1907, section 4761.

New Mexico—Statutes of 1915, section 5869.

EXECUTION OF WILLS. REVOCATION. CLASSES.

I. Execution of Wills. Classes.

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| (1) In general. | (3) Limitation upon right as to certain persons. Indians. |
| (2) Creation of statute. | (4) Same. Insane persons. |
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- (7) Paramount authority of probate court.
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- 17. Instruments construed not to be wills.
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 - (3) Manner of revocation.
- 2. Facts and evidence relating to.
- 3. Revocation of devise.
- 4. Revocation by subsequent will.
- 5. Same. Evidence.
- 6. Revocation by codicil.
- 7. Revocation by marriage, etc.
- 8. Same. Effect of divorce.
- 9. Same. Revocation of consent.

I. EXECUTION OF WILLS. CLASSES.

1. Right of testamentary disposition.

(1) **In general.**—The right to dispose of one's property by will, and to bestow it upon whomsoever the testator likes, is a most valuable incident to ownership, and does not depend upon the judicious use of that right. The decisions go so far as to say, that while it seems harsh and cruel that a parent should disinherit one of his children and devise his property to others, or cut them off and devise it to strangers from some unworthy motive, yet so long as that motive, whether from pride or aversion, or spite or prejudice, is not resolvable into mental perversion, no court can interfere.—*In re Holden's Estate*, 42 Or. 345, 70 Pac. 908, 913; and see *Estate of Kauffmann*, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; *Potter v. Jones*, 20 Or.

239, 25 Pac. 769, 12 L. R. A. 161. In *re Shell's Estate*, 28 Colo. 167, 89 Am. St. Rep. 181, 53 L. R. A. 387, 63 Pac. 413, 416. Every person possesses absolute dominion over his property and may bestow it upon whomsoever he pleases, without regard to natural or legal claims upon his bounty, if he possesses testamentary capacity, and exercises his own individual will and judgment in the matter.—In *re Turner's Will*, 51 Or. 1, 93 Pac. 461, 464; *Potter v. Jones*, 20 Or. 239, 25 Pac. 769, 12 L. R. A. 161. The right of independent disposition of property by will is absolute, and no presumption can be indulged in against the exercise of this legal right.—*Hunt v. Phillips*, 34 Wash. 365, 75 Pac. 970, 972. A person competent to make a will has a right to select the custodian, and to cause it to remain in his hands until called for, or until death makes it necessary for the custodian to deliver it to the court, or to a person named in the will.—*Mastick v. Superior Court*, 94 Cal. 347, 350, 29 Pac. 869. A will is a disposition of property to take effect on or after the death of the owner; it implies a subject-matter of gift and an object, and by the statute it must be in writing, signed by the testator, and attested by two witnesses.—*Mercer v. Kirkpatrick*, 22 Haw. 644, 647. The estate of a testator, earned by his industry and ability, is his own, and he has a legal right to dispose of it as he chooses.—In *re Sturtevant's Estate*, *Sturtevant v. Sturtevant* (Or.), 178 Pac. 192, 180 Pac. 595. A person's right to dispose of his property by will is assured by law and is a valuable incident to ownership, regardless of its judicious use.—*Points v. Nier*, 91 Wash. 20, Ann. Cas. 1918A, 1046, 157 Pac. 44. If a decedent leaves a will but no estate, an order appointing an administrator with the will annexed will be set aside.—*Estate of Anderson*, 18 Ariz. 266, 269, 158 Pac. 457. The right to dispose of one's property by will is a valuable right and will be sustained if possible.—In *re Peters' Estate*, *Nuhse v. Peterson*, 101 Wash. 572, 172 Pac. 870. The plenary power of disposition of the owner as he may see fit, of course, includes the right to make an unnatural or unreasonable distribution.—*Singer v. Taylor*, 90 Kan. 285, 133 Pac. 842. The right to make a will is given in order that the devolution of property under the statutes of descents and distribution may be cut off according to the testator's own will; the law does not require that a will shall be rational or reasonable or sensible or kind.—*Wisner v. Chandler*, 95 Kan. 36, 147 Pac. 849. One may dispose of his property to strangers and exclude heirs.—*Ruth v. Krone*, 10 Cal. App. 770, 103 Pac. 960. There is no duty on the part of a testator to will his property to relatives rather than to a stranger.—In *re Burnham's Will*, 24 Colo. App. 131, 134 Pac. 257. The right of a testator to dispose of his estate depends on neither the justice of his prejudices nor the soundness of his reasoning; his freedom of disposition will not be interfered with except in cases of defect in testamentary capacity, or fraud.—In *re Murphy's Estate*, 98 Wash. 548, 168 Pac. 175. If a man chooses to dispose of his property by will, instead of leaving it to be disposed of, after his death, under the laws of descent and distribution, his choice is not to be questioned by

persons who would benefit by his intestacy.—*Estate of Carey*, 56 Colo. 77, 91, Ann. Cas. 1915B, 951, 51 L. R. A. (N. S.) 927, 136 Pac. 1175.

(2) **Creation of statute.**—The right to make a testamentary disposition of property is neither a natural nor a constitutional right, but is derived from and rests in positive law.—*Strand v. Stewart*, 51 Wash. 685, 99 Pac. 1028. The right to will away real estate is not inherent but is purely a creature of legislation; the legislature may give such right and the legislature may take it away.—*Postlethwaite v. Edson*, 104 Kan. 619, 171 Pac. 769, 773. The right of testamentary disposition of property is created wholly by statute and exists under absolute legislative control.—*Irwin v. Rogers*, 91 Wash. 284, L. R. A. 1916E, 1130, 157 Pac. 690. The right to dispose of property by will is purely statutory.—*In re Price's Estate*, 14 Cal. App. 462, 112 Pac. 482. The right to make a testamentary disposition of one's property is purely of statutory creation, and is available only on compliance with the requirements of the statute.—*Estate of Tyrrell*, *Knauff v. Davidson*, 17 Ariz. 418, 422, 153 Pac. 767. The right to make a testamentary disposition of property is not an inherent right; nor is it a right guaranteed by the fundamental law. Its exercise to any extent depends entirely upon the consent of the legislature, as expressed in the statute enacted on the subject. It can withhold or grant the right, and, if it grants it, it may make its exercise subject to such regulations and requirements as it pleases. It may declare the rules which must be observed, touching the execution and authentication of the instruments, and make a compliance with them mandatory.—*In re Noyes' Estate*, 40 Mont. 178, 105 Pac. 1015. The right to make a will includes the right to make it according to the testator's own desires, subject only to the statutory restrictions. It is no condition of this right that the will shall please a jury or a court, or the testator's relatives or any one else. The giving of unequal portions to the natural objects of the testator's bounty raises no presumption of undue influence. The fact may be considered in determining the question: Is this the testator's will? But in the absence of proof of undue influence it has no weight.—*Ginter v. Ginter*, 79 Kan. 721, 22 L. R. A. (N. S.) 1024, 101 Pac. 635. The statute of Washington, concerning the devise of an estate, where the devisee dies before the testator, applies only to estates devised by will; it has no controlling application to the estate of an intestate, the devolution of which is explicitly defined and limited by the statute of descent.—*In re Roberts' Estate*, 84 Wash. 163, 146 Pac. 398.

REFERENCES.

Is the right to take property by will or inheritance a natural, or a statutory right? See note 9 L. R. A. (N. S.) 121-123. Testamentary disposition of child, right of mother to make.—See note 7 Am. & Eng. Ann. Cas. 450. See note § 69, ante, head-line 3, subd. 2. Power to make will generally.—See note *Kerr's Cal. Cvc. Civ. Code*, § 1270.

(3) Who may make a will.—Every person of legal age and mental capacity has the right to dispose of his property by will.—*Estate of Martin*, 170 Cal. 657, 151 Pac. 138. Every person competent to contract has a right, given by statute, to dispose of property by will, subject only to such limitations as a sound public policy may dictate.—*Johnson v. Shaver* (S. D.), 172 N. W. 676. The right to make testamentary disposition of property depends entirely upon the will of the legislature. It may withhold the right altogether, or impose any limitations or conditions upon it which it chooses, and it follows therefore that the legislature also has the exclusive power to designate those whom the testator may make the objects of his bounty.—*In re Beck's Estate*, 44 Mont. 561, 121 Pac. 786. Prior to the act of congress of April 26, 1906, a full-blood Creek Indian had the power to make a will, but he had no right to alienate his allotment by a will.—*Wilson v. Greer*, 50 Okla. 387, 151 Pac. 629.

(4) Testamentary nature of instrument.—An instrument which described itself as a "will testament," by which the signer undertook to "will" a part of his property to his sons, and the remainder at his death to his widow, who was named as administratrix, no word being used appropriate to a present grant, is held to have been wholly testamentary in character, although acknowledged and recorded and not witnessed.—*Coburn v. Simpson*, 102 Kan. 234, 237, 170 Pac. 383. The creation of a joint tenancy is not a testamentary disposition, and of itself raises no inference or presumption that it was created in contemplation of death, and where the evidence shows that the only purpose mentioned in creating it was to place the money in a joint account so that either husband or wife could draw it out at pleasure, and nothing was said concerning the death of either, or the postponement of enjoyment of either, or restriction of use by either, the court was justified in its conclusion that the joint deposit was not made in contemplation of death of either husband or wife.—*In re Gurnsey's Estate*, 177 Cal. 211, 170 Pac. 402, 403. Any memorandum in writing, regardless of its form and whether payable in money or specific property, whereby a debt is acknowledged by one as owing to another to whom the memorandum is delivered, is sufficient to create an enforceable obligation, to be discharged in the writer's lifetime or, after his death, by his executors.—*Patterson v. Chapman*, 179 Cal. 203, 176 Pac. 37. A writing, whatever it may be in form and in whatever payable, which acknowledges a present obligation to the person in whose favor it is made, is not testamentary in character, even though it be expressly non-operative until after the maker's death.—*Patterson v. Chapman*, 179 Cal. 203, 176 Pac. 37.

REFERENCES.

What constitutes a testamentary writing.—89 Am. St. Rep. 486.

2. Limitation of the right.

(1) In general.—The privilege of disposing of one's property by will is not a natural right, but depends upon positive law. The right is

within the control of the law-making power.—*In re Little's Estate*, 21 Utah 204, 61 Pac. 899, 900. The right of any person to execute a will, as well as the form in which the will must be executed, or the manner in which it may be revoked, are matters entirely of statutory regulation. The legislature has the power to limit the class of persons who shall be competent to make a will, or to declare that a change in the personal status of such persons after its execution shall operate as a revocation of the will, or be a sufficient reason for denying it probate.—*In re Comassi's Estate*, 107 Cal. 1, 28 L. R. A. 414, 40 Pac. 15, 16; *Estate of Bump*, 152 Cal. 274, 92 Pac. 643. This right to make a testamentary disposition of property is available only upon a compliance with the requirements of the statute. For the purpose of determining whether a will has been properly executed, the intention of the testator in executing it, is entitled to no consideration. For that purpose only the intention of the legislature, as expressed in the language of the statute, can be considered by the court, and whether the will, as presented, shows a compliance with the statute.—*Estate of Seaman*, 146 Cal. 455, 106 Am. St. Rep. 53, 2 Ann. Cas. 726, 80 Pac. 700, 701; and see *Estate of Walker*, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104.

(2) *Special limitations by statute.*—The provision of the California statute providing that, where a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, is not to be construed as a limitation upon the power of the testator to make provision for a substitution. If the will provides for such contingency, this statute has no application.—*Estate of Bennett*, 134 Cal. 320, 66 Pac. 370, 371. In determining whether gifts to charity exceed one-third of "estate of testator" leaving heirs, in violation of section 1313 of the Civil Code of California, the court should consider all the property of testator wherever situated, whether within or without its jurisdiction.—*In re Dwyer's Estate*, 159 Cal. 680, 115 Pac. 242. There is no limitation on right to make charitable bequests except as prescribed by said statute.—*In re Dwyer's Estate*, 159 Cal. 680, 115 Pac. 242. Since only one-third of assets after payment of debts and charges can go to charity, trustees entitled to proceeds of sale of land for charity were entitled to only such proceeds after deducting costs and expenses of sale.—*In re Dwyer's Estate*, 159 Cal. 680, 115 Pac. 242. Section 1469 of the Code of Civil Procedure of California providing for the setting aside of an estate not exceeding \$1500 in value, for the use and support of the family of the deceased, is a limitation on and controls the general power of testamentary disposition conferred by section 1270 of the Civil Code of that state.—*Estate of Miller*, 158 Cal. 420, 111 Pac. 256.

(3) *Limitation upon right as to certain persons. Indians.*—Where an Indian receives a deed of land from the United States government, with the condition that the same shall not be alienated, such person has no power to pass title to the land by will. The word "alienate" means, among other things, the power of disposition by will.—*Jackson v.*

Thompson, 38 Wash. 282, 80 Pac. 454, 456. The will of a member of the Cherokee tribe of Indians who was enrolled and the land filed on after her death, is invalid because it was an attempt to alienate made before the removal of restrictions.—*Semple v. Baken*, 39 Okla. 563, 135 Pac. 1141. The statutes of Oklahoma are supplanted by the acts of congress in relation to wills, so far as the Five Civilized Tribes are concerned.—*Bröck v. Keifer*, 59 Okla. 5, 157 Pac. 88; 91. The alienation of an Indian allotment being governed by the act of congress, the right of an Indian to devise the same must be governed and controlled thereby.—*Letts v. Letts* (Okla.), 176 Pac. 234, 235. Minority is a federal restriction and an Indian under age of 21 years does not possess the authority by will to dispose of his allotment, which was restricted.—*Letts v. Letts* (Okla.), 176 Pac. 234, 235. An alienation by a minor allottee of the Creek nation of his allotment is void, and a devise by will is an alienation within the meaning of the act of congress.—*Letts v. Letts* (Okla.), 176 Pac. 234, 235. An alienation by a minor allottee of the Creek nation of his allotment is void; a will is an alienation within the meaning of the act of congress (May 27, 1908).—*Letts v. Letts* (Okla.), 176 Pac. 234, 235. A full-blood Creek Indian, who died in March, 1900, could not dispose by will of lands subsequently allotted to his heirs.—*Coachman v. Sims*, 36 Okla. 536, 129 Pac. 845. The provisions of the act of congress to the effect that no will of a full-blood Indian devising real estate shall be valid if it disinherits the parent, wife, spouse, or children of such full-blood, does not embrace within its terms grandchildren or great grandchildren, and if a full-blood Indian leaves surviving him no parent, wife, spouse, or children, but leaves grandchildren and relations further removed, his will otherwise sufficient, as to execution, does not have to be acknowledged before and approved by a judge or commissioner of the United States court, or the judge of a county court of the state of Oklahoma.—*Bell v. Davis*, 55 Okla. 121, 155 Pac. 1132, 1135. The sole surviving parent of a minor Creek Indian allottee is entitled to all his allotment, and such allottee has no power, because of his minority, to dispose of such allotment by will, and a petition in a suit to quiet title brought by such surviving parent, containing averments of these facts is held to state a cause of action and it was error to sustain a demurrer to such petition.—*Letts v. Letts* (Okla.), 176 Pac. 234. The act of congress imposing restrictions upon the alienation of Indian allotments does not apply to one who is not a full-blood Indian within the meaning of the act, and under the laws of Oklahoma persons over the age of 18 years may dispose of their property by will; but minority is a federal restriction, and under the act of congress an Indian under 21 years did not have the authority to dispose of his allotment by will, and the act of congress must govern and control in all matters pertaining to Indian allotments.—*Letts v. Letts* (Okla.), 176 Pac. 234, 235. Where a full-blood Mississippi Choctaw Indian died in 1907, after he had been duly identified and resided upon the lands of the Choctaw nation for the required length of time,

as provided by act of congress, but before proof of continuous bona fide residence was made, as required by the act, and before patent was issued, such Choctaw Indian did not have a devisable interest in such lands, and the title of the heirs acquired under the act of congress of April 26, 1906, was not affected by a will made prior to such proof.—*Criner v. Farve*, 44 Okla. 618, 146 Pac. 10.

(4) **Same. Insane persons.**—A man may be of unsound mind, and his whole neighborhood may declare him so; but whether that unsoundness amounts to incapacity for a discharge of the important duty of making a final disposition of his property, is a question which the court must determine on its own responsibility.—*Estate of Wasserman*, 170 Cal. 101, 148 Pac. 931. The rule of law is not that no person who is insane may make a valid will, but that the will of no person who, by reason of insanity, is incapable of making valid testamentary disposition shall be upheld.—*Estate of Wasserman*, 170 Cal. 101, 148 Pac. 931.

(5) **Same. Person under guardianship.**—A person under guardianship does not on that account lose his right to make testamentary disposition of his estate, in case he retains sufficient mental capacity to execute a will.—*In re Sturtevant's Estate*, *Sturtevant v. Sturtevant*, 92 Or. 269, 178 Pac. 192, 180 Pac. 595.

(6) **Same. Married persons.**—The Kansas statute provides as follows: "No man while married shall bequeath away from his wife more than one-half of his property, nor shall any woman, while married, bequeath away from her husband more than one-half of her property. But either may consent, in writing, executed in the presence of two witnesses, that the other may bequeath more than one-half of his or her property from the one so consenting." Under this statute, if a husband signs a consent, to the provisions of his wife's will, to permit her to bequeath her property, such consent imports its own consideration, but will not be construed, in the absence of any consideration, as a conveyance of an interest or estate in his own property.—*Wilson v. Johnson*, 4 Kan. 747, 46 Pac. 833, 835. Under the statute of Kansas, which provides that the husband or wife may bequeath away from the other more than one-half of his or her property, if the other spouse gives consent in writing, executed in the presence of two witnesses, the form or name of the writing giving consent is not important, if it sufficiently shows that the one consenting agrees to accept any provision made in the will in place of the share which the statute would give, and that it is duly witnessed. Nor is it necessary that the witnesses shall subscribe their names to the writing. It is enough that it is executed in their presence.—*Jack v. Hooker*, 71 Kan. 652, 81 Pac. 203, 205. It is not within the power of the husband, by any provision of his will, to deprive his wife of her right to allowance for the support of herself and children during the settlement of the estate, or to limit, in any way, the power of the court, in the exercise of its proper discretion, to fix the amount to be allowed.—*Estate of Bump*, 152 Cal.

274, 92 Pac. 643, 644. The Utah statute empowers a married man to dispose by will of all his property, real and personal; except that, if he would leave away from his wife more than two-thirds of his legal and equitable real estate, he must first secure her consent in writing.—*In re Schenk's Estate* (Utah), 178 Pac. 344. The statutory requirement that a married man shall bequeath away from his wife no more than one-half of his property, except by her consent given in writing in presence of two witnesses, does not contemplate a signing of the writing by the witnesses, nor does it contemplate that the writing shall bear any particular designation, so long as it amounts to a relinquishment of the statutory share and an agreement that more than one-half shall go elsewhere.—*White v. White*, 103 Kan. 816, 176 Pac. 644. The provisions of the Colorado statute do not affect the validity of the will of a married woman but operate only on its distributive provisions in case the husband survives and does not consent to the will.—*Deutsch v. Rohlfing*, 22 Colo. App. 543, 126 Pac. 1126. At no time in the history of the state of Colorado has a married woman been incapable of making a will, with or without the consent of her husband.—*Deutsch v. Rohlfing*, 22 Colo. App. 543, 126 Pac. 1126. Where the law provides that no married woman shall by will devise away from her husband more than one-half of her property without his consent in writing, executed after her death but that it shall be optional with the husband to accept under the will or take one-half of the whole estate, where the husband appears at the probate of the will and files his written consent to its provisions, he is irrevocably bound by such election.—*Deutsch v. Rohlfing*, 22 Colo. App. 543, 126 Pac. 1127. A husband can not devise or bequeath away from his wife more than one-half of his property without her consent, and a will purporting to give the whole of his lands to persons other than his wife, where her consent has not been given, will not operate to transfer or affect the half interest to which she is entitled.—*Williams v. Campbell*, 85 Kan. 631, 118 Pac. 1074. A testatrix who has a husband but no children has a right to devise one-half of her property to her brothers and sisters without the consent of her husband.—*Carmen v. Kight*, 85 Kan. 18, 116 Pac. 231. A married man may with the consent of his wife given in the manner prescribed by law dispose of his property by will as if unmarried.—*Hanson v. Hanson*, 81 Kan. 305, 105 Pac. 444.

(7) *Paramount authority of probate court.*—Power of testamentary disposition is subordinate to authority given probate court to appropriate the property for support of family of testator, and set apart homestead, as well as for payment of debts.—*In re Kennedy's Estate*, 157 Cal. 517, 108 Pac. 280. Probate court may set apart property as homestead though it be specifically devised, thus defeating the devise.—*In re Kennedy's Estate*, 157 Cal. 517, 108 Pac. 280. Property and funds set apart absolutely by probate court order for homestead and for maintenance of family do not pass under will to persons taking, though such persons be devisees.—*In re Kennedy's Estate*, 157 Cal. 517, 103

Pac. 230. Testator held powerless to prevent widow from taking whole estate if less than \$1500, as provided by section 1469 of the Civil Code of California despite section 1270, authorizing every one to dispose of all of his estate.—*In re Miller's Estate*, 158 Cal. 420, 111 Pac. 255. Testator's power in general.—See note to *Wright v. Masters*, 135 Am. St. Rep. 794.

(8) **Right of wife to support as limiting testator's control.**—The testator can not so dispose of his property as to relieve it from the burden of supporting his widow and children, whenever the court, having jurisdiction of the administration of the estate, shall make an order to that effect.—*Estate of Bump*, 152 Cal. 274, 92 Pac. 643. Where a husband directs, in his will, the payment to his wife, during her life, of such sums of money as may, in the sound judgment and discretion of the trustees, be reasonable and sufficient for her maintenance, following such provision with specific bequests which can not be made out of the estate, if the preceding bequests and trusts be observed, the wife is entitled to preference, under the terms of the will, as against the opposing legatees.—*In re Sear's Estate*, 18 Utah 193, 55 Pac. 83, 84.

3. Testamentary capacity.

(1) **In general.**—It can not be said that a testator lacks testamentary capacity, where there is nothing to indicate that he was not sane, or in full possession of his faculties, or that he was acting under excitement or undue influence at the time of making his will. Though illiterate, it is sufficient if the testator knew and understood what he was doing, and to whom he was giving his property, when he executed his will, and that the will was read over to him before signing.—*Franke v. Shipley*, 22 Or. 104, 29 Pac. 268. Habits of drunkenness do not of themselves take away a man's capacity to make a will.—*Estate of Wilson*, 117 Cal. 262, 49 Pac. 172, 176. (See cases reviewed in the decision as to the bearing upon testamentary capacity of testimony relating to drunkenness or the drinking habit.) The expression "unsound mind" stands for and includes the want of a disposing mind or testamentary capacity.—*Clements v. McGinn*, 4 Cal. Unrep. 163, 33 Pac. 920, 921. One who has made a will is presumed to have been competent to make a valid will, unless it is proved that he was not.—*Edwardson v. Gerwien* (N. D.), 171 N. W. 101. It is essential to the sound and disposing mind requisite for the making of a will that the testator have an understanding of the nature of the business in which he is engaged, and an understanding and recollection as to his property which he means to dispose of, of his relations to his relatives and those around him, of the persons who are the objects of his bounty, and the manner in which it is to be distributed.—*Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307.

REFERENCES.

Aversion to relatives as affecting mental capacity to make a will.—See note 117 Am. St. Rep. 582-585. Morphinism, effect of, on testamentary capacity.—See note 39 L. R. A. 262-265. Spiritualism, belief in, as affecting testamentary capacity.—See note 36 Am. Rep. 426. Consult notes to the following sections of Kerr's Cal. Cyc. Civ. Code, as to the subjects indicated: Unsoundness of mind, § 1270; testamentary capacity, generally, § 1270; intoxication as affecting testamentary capacity, § 1270; unnatural and inequitable wills, § 1270. Testamentary capacity to make a will.—See notes 1 L. R. A. 161, 2 L. R. A. 668, 6 L. R. A. 167, 8 Am. Rep. 184, 84 Am. Dec. 240, 41 Am. Rep. 686, 3 L. R. A. (N. S.) 172.

(2) As affected by age and physical infirmity.—Notwithstanding a testator's old age, sickness, inability of body, or extreme distress, if, at the time he executes his will, he understands the business in which he is engaged, and has a knowledge of his property, and how he wishes to dispose of it among those entitled to his bounty, he possesses testamentary capacity.—In re Pickett's Will, 49 Or. 127, 89 Pac. 377, 382; In re Ames' Will, 40 Or. 495, 67 Pac. 737; Bain v. Cline, 24 Or. 175, 41 Am. St. Rep. 851, 33 Pac. 542, 543; In re Buren's Will, 47 Or. 307, 83 Pac. 530, 531. A man may be extremely weak and feeble physically, and may be in a dying condition, and yet retain his mental faculties and will power to such an extent as to enable him to make a valid will, but such a feeble and dying condition is to be given consideration in determining his mental capacity, and is of more significance, where there is also evidence tending directly to show the fact of his feeble mental condition.—Estate of Doolittle, 153 Cal. 29, 94 Pac. 240, 242. A person may be very feeble, may be aged and infirm and suffering from disease, and yet be capable of disposing of his property.—In re Weber's Estate, 15 Cal. App. 224, 114 Pac. 597. A person may be old, ill, debilitated, and distressed, and yet be of sufficient capacity to make a will; provided he understands his business at the time and what property he has, and knows how he wishes to dispose of this among the persons entitled to his bounty.—In re Diggins's Estate, Diggins v. Diggins, 76 Or. 341, 149 Pac. 73. A testator, although feeble in health, suffering under disease, aged and infirm, has the mental capacity to make a will, if he is able to understand and carry in mind the nature and situation of his property and his relations to his relatives and those around him, with clear remembrance as to those in whom and those things in which he has been most interested, capable of understanding the act he is doing, and the relation in which he stands to the objects of his bounty, free from any delusion, the effect of disease, which might lead him to dispose of his property otherwise than he would if he knew and understood what he was doing.—Estate of Huston, 163 Cal. 166, 124 Pac. 852. The infirmities of old age are not sufficient in themselves to establish a lack of testamentary capacity.—Estate of Clark, 170 Cal. 418, 149 Pac. 828. One who, by reason of

old age and infirmity, has become less bright of mind than formerly, may still retain mentality enough to enable him to grasp the nature of what he does when making his will, comprehending what property he has, and being mindful of all persons who have a right to succeed to his estate should he die intestate.—*In re Sturtevant's Estate*, *Sturtevant v. Sturtevant*, 92 Or. 269, 172 Pac. 192, 180 Pac. 595.

REFERENCES.

Testamentary capacity as affected by age, ill health, etc.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1270.

(3) *As affected by fraud, undue influence, etc.*—A mere confidential relation existing between the testator and a beneficiary under a will, or the opportunity of such beneficiary to exercise undue influence over the testator, is not enough to avoid a will. The fraud or undue influence that will suffice to set aside a will, must be such as to overcome the free volition or conscious judgment of the testator, and to substitute the wicked purpose of another instead, and must be the efficient cause, without which the obnoxious disposition would not have been made.—*In re Turner's Will*, 51 Or. 1, 93 Pac. 461, 464; *In re Holman's Will*, 42 Or. 345, 70 Pac. 908. Undue influence is defined to be the use, by one in whom a confidence is reposed by another, who holds a real or apparent authority over him, of such confidence or authority, for the purpose of obtaining an unfair advantage of his weakness of mind, or of his necessities or distress.—*Dolliver v. Dolliver*, 94 Cal. 646, 30 Pac. 4. The question as to the boundary of legitimate influence must be determined by a consideration of the relation between the parties, the character, strength, and condition of each of them, the circumstances of the case, and the application of sound practical sense to the facts of each given case. The mental and physical condition of the testator, and the provisions of the will itself may be considered.—*In re Welch's Will*, 6 Cal. App. 44, 91 Pac. 336, 337. To vitiate a will there must be more than influence. It must be undue influence. To be classed as "undue," influence must place the testator in the attitude of saying, "It is not my will, but I must do it." He must act under such coercion, compulsion, or constraint that his own free agency is destroyed; under this rule, undue influence was not shown in the present case.—*Ginter v. Ginter*, 79 Kan. 721; *Black v. Funk*, 97 Kan. 509, 155 Pac. 959. Where a will has been drawn by a scrivener according to instructions given by the testator—no other person being in the room at the time, and, as drawn, the instrument is clear and consistent throughout, making bequests to relatives and friends and providing for the carrying out of its purposes; the testator can not be said to have been unduly influenced merely because the executor is given the residue, by reason of services performed for the testator, and care exercised for him.—*Black v. Funk*, 97 Kan. 509, 155 Pac. 959. Undue influence, sufficient to invalidate a will, is something more than argument or even persuasion; it must be such as has overcome free volition or conscious judgment in the testator and substituted the bad

purposes of another.—In *re* Diggins's Estate, *Diggins v. Diggins*, 76 Or. 341, 149 Pac. 73.

REFERENCES.

Effect of unnatural testamentary disposition on question of undue influence.—See note 6 L. R. A. (N. S.) 202, 204. Fraud and undue influence in connection with drunkenness, as affecting testamentary capacity.—See note 39 L. R. A. 220. Declarations of a testator, not made at the time of the execution of his will, admissibility of, on question of undue influence.—See note 10 Am. & Eng. Ann. Cas. 600.

(4) Evidence.—A subscribing witness to a will is, beyond question, competent to testify as to the testator's mental condition; but if he be a person who had done business with the testator in his lifetime, and had considerable opportunity for observing his conduct, that of itself would render him competent.—*Durant v. Whitchen*, 97 Kan. 603, 156 Pac. 739. One may be incompetent to make a will by reason of want of development of the mental faculties, although he is neither a lunatic, an idiot, nor an imbecile, nor in any way possessed by delusions.—*Estate of De Laveaga*, 165 Cal. 307, 133 Pac. 307. Hard drinking and frequent intoxication do not of themselves afford sufficient grounds for testamentary incapacity.—*Weatherall v. Weatherall*, 63 Wash. 526, 115 Pac. 1079. The conduct of a person past the age of childhood and within a few months of the age of majority, at a family gathering, where in her presence and hearing her mental competency is being discussed and the claim asserted and apparently accepted by all present that she is so weak minded as to need the guardianship and care of others throughout her life, and it is being discussed whether or not a writing expressing the view that she is so affected shall be made a public record, is some evidence on the question of her competency at the time.—*Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307. Testimony as to the contents of a letter of the father of the testatrix accompany his will, in which he recommended the testatrix to the care of her eldest sister on account of her weak mind, is admissible, where it was shown that the testatrix was present at the conversation between the members of the family in which the question of whether the letter should be filed with the will was discussed, and said nothing.—*Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307. The fact that a man makes a will and immediately thereafter dies by his own hand may be considered in judging of his testamentary capacity.—*Estate of Wasserman*, 170 Cal. 101, 148 Pac. 931. Letters written by the proponent to the contestant showing a departure of the former and the testatrix from the state for fear of incompetency proceedings, while inadmissible for impeachment purposes as going to a collateral matter, such admission was not erroneous, where the only objection interposed thereto was the incompetency of the declarations against the other beneficiaries under the will.—*Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307. A letter written by the proponent to the contestant prior to the death of the testatrix, containing statements going to show that

the proponent was of the opinion that the deceased was mentally incompetent, is not improperly admitted, where such evidence is admitted and received not for the purpose of showing a declaration against interest, or admission, or as independent substantive evidence on the issue of competency, or undue influence, but on the theory that on account of the interest of the proponent and her hostility to the contestant he had the right upon the cross-examination of the contestant, when taken by surprise by her answers to certain questions as to matters contained in such letter, to prove by the same her previous statements to the contrary.—*Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307. A declaration of any number of legatees or devisees less than all upon the question of the mental competency of the deceased is not admissible in evidence on the issue of competency, for the reason that the interests of the legatees and devisees under a will are several and not joint, and that it would be unjust to allow the interest of one to be affected by the admissions of another with whom he is not in privity.—*Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307. Where a probated codicil to a will was contested upon petition of a daughter of the testator to revoke the probate thereof for unsoundness of mind, as well as on other grounds, and the court found that when the codicil was executed the testator was of sound and disposing mind, it was held that, though there was evidence that he was then seventy-nine years old, was growing weaker physically, and that there was a gradual impairment of his memory and mental faculties, yet there was other evidence to show his testamentary capacity at that time, and that, as soundness of mind is to be presumed, and as the burden on the contestant to show unsoundness of mind at that time was not sustained, the finding of the court was sufficiently supported.—*Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597. An adjudication of a testator's incompetency, made in a proceeding for the appointment of a guardian of his person and estate eleven days after the execution of his will, while not conclusive in a contest of the will, as to his incompetency at the time of its execution, is proper evidence to be considered on the issue of want of testamentary capacity at the time of the adjudication, and, in connection with testimony tending to show that his mental condition had not changed during the interim, is admissible on the issue of capacity at the time the will was made.—*Estate of Loveland*, 162 Cal. 595, 123 Pac. 801. In a will contest, where the probate of a will was denied, in which the finding of the court that the testator was incompetent is sustained by the evidence, the refusal to permit a witness for the proponent, who had only known the testator for a period of ten or twelve days, to testify as an "intimate acquaintance" to her opinion regarding his mental sanity, will not justify a reversal.—*Estate of Loveland*, 162 Cal. 595, 123 Pac. 801. It is proper to permit a witness to testify to his observation of the testator's "appearance" with reference to physical and mental condition. Such testimony is not opinion evidence.—*Estate of Loveland*, 162 Cal. 595, 123 Pac. 801.

The fact that a testator is a suicide may be given in evidence as tending to establish insanity, but standing alone, proof of that fact is insufficient to show a want of testamentary capacity.—*Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130. Evidence that a testator, who was otherwise competent, made a college, in which he had previously shown no interest, his residuary legatee, under the belief that his estate was practically exhausted by specific bequests, when in fact the residue amounted to more than two-thirds of the whole, is not sufficient to warrant a finding of a want of capacity to make such a provision.—*Holmes v. Campbell College*, 87 Kan. 597, Ann. Cas. 1914A, 475, 41 L. R. A. (N. S.) 1126, 125 Pac. 25. The opinion that a testator was of unsound mind, given by a witness who knew him, is of value only in so far as the facts on which it was based are material to prove such a mental condition.—*Flint v. Flint*, 179 Cal. 552, 177 Pac. 451. Where a testator has harbored strange beliefs, delusions, and hallucinations as to things projected by others with intent to annoy and injure him, the fact, and the delusions, etc., themselves, may be considered in determining his testamentary capacity.—*Estate of Wasserman*, 170 Cal. 101, 148 Pac. 931. Confinement of a man's sister in an asylum for the insane may be considered, in determining his testamentary capacity, as tending to show that there was insanity in the family.—*Estate of Wasserman*, 170 Cal. 101, 148 Pac. 931. Where a testator leaves his little property away from his aged mother and from his brothers, from whom he has not been estranged, the circumstance may be considered by a jury in determining his testamentary capacity.—*Estate of Wasserman*, 170 Cal. 101, 148 Pac. 931. Erratic and disconnected entries found in the diary of a testator may be taken into consideration in determining his testamentary capacity.—*Estate of Wasserman*, 170 Cal. 101, 148 Pac. 931. The fact that a testator is grossly mistaken as to the extent of his estate does not establish a want of testamentary capacity, the true test in this regard being whether he is capable of comprehending the quantity of his property and its value.—*Holmes v. Campbell College*, 87 Kan. 597, Ann. Cas. 1914A, 475, 41 L. R. A. (N. S.) 1126, 125 Pac. 25. Evidence held insufficient to support finding of mental incompetency from intemperate habits.—*In re Carither's Estate*, 156 Cal. 422, 105 Pac. 127. Evidence tending to show a weakened memory on the part of the testator, but without any showing of impairment of his ability to grasp the salient facts in relation to his property, its situation, and the objects of his bounty, would not suffice as proof of want of testamentary capacity.—*In re Packer's Estate*, 164 Cal. 525, 129 Pac. 778, 780.

REFERENCES.

What is testamentary capacity.—See note 27 L. R. A. (N. S.) 1. Effect of an adjudication of insanity or existence of guardianship as showing want of capacity to execute contracts, make wills and the like.—See note to *In re Will of Van Houten*, 140 Am. St. Rep. 346-358. Whether part of a will may be set aside for lack of testamentary

capacity or undue influence and the remainder upheld.—See note 41 L. R. A. (N. S.) 1126.

(5) *Insanity*.—Where one of the causes relied on by the contestant as tending to show that the testatrix was insane was the fact that she had been accused by her employer with the theft of several hundred dollars a day for several days prior to her discharge from her employment, it was not error to refuse to allow her employer to testify to the amount of such thefts. There being no issue over the truth or falsity of the charge, the exact amount of the alleged peculations was unimportant.—Estate of Chevallier, 159 Cal. 161, 113 Pac. 130. Not every form of insanity, nor every mental departure from the normal, will destroy an otherwise valid testamentary act. The rule is not that no person who is insane may make a valid will, but that the will of no person who, by reason of insanity, is incapable of making valid testamentary disposition shall be upheld.—Estate of Chevallier, 159 Cal. 161, 113 Pac. 130. Where during a large portion of the time the business of the person whose sanity is questioned is transacted by others by means of letters and cablegrams from one to the other, such letters and cablegrams constitute a part of the *res gestae* in the matter of the actual transaction of business.—Estate of De Laveaga, 166 Cal. 607, 133 Pac. 307. Absolute acquiescence by the person whose soundness of mind is in question in a course of conduct on the part of those around him with relation to his property and personal affairs which no person of sound mind would tolerate or acquiesce in, is competent evidence tending to show an unsound mind.—Estate of De Laveaga, 166 Cal. 607, 133 Pac. 307. To show the condition of one's mind at a given time as respects sanity or insanity, evidence tending to show such condition both shortly before and shortly after the time is admissible.—Estate of Huston, 163 Cal. 166, 124 Pac. 852. While the manner in which a person whose sanity is in question is treated by his family is not, taken alone, competent substantive evidence tending to prove insanity (for it is a mere extrajudicial expression of opinion on the part of the family), it is proper evidence when given in connection with the conduct of the alleged insane person under such treatment, as illustrating and explaining such condition.—Estate of De Laveaga, 166 Cal. 607, 133 Pac. 307. The fact that a physician described the condition of the testatrix as senile dementia, and declared such person to be of unsound mind, does not constitute the sort of incompetency or sanity which, in the estimation of the law and of all men of ordinary sagacity and prudence, renders a person incapable of executing contracts or making a will.—In re Purcell's Estate, 164 Cal. 300, 128 Pac. 932, 935. Insanity that will invalidate a will must be an insanity of one of two forms: either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, under which the testator is the victim of some hallucination or delusion. In the latter class of cases, the evidence must further establish that the will itself was the creature

or product of such hallucination or delusion, or that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument.—*Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130. The wills of aged and infirm people, or people sick in mind as well as in body, are always upheld, if, notwithstanding their enfeeblement, testamentary capacity is shown. It may be well and perhaps soundly reasoned that all persons who commit crime and that all persons who commit suicide are aberrant, abnormal, and therefore insane. But such is not the insanity which the law has in mind. It must be an insanity of one of two forms: either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, in which the testator is the victim of some hallucination or delusion. And even in the latter class of cases it would not be sufficient merely to establish that the testator was the victim of some hallucination or delusion to avoid the will. The evidence must go further and establish that the will itself was a creature or product of such hallucination or delusion, or, in other words, that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument.—*In re Purcell's Estate*, 164 Cal. 300, 128 Pac. 932, 937.

(6) *Delusions*.—Mental capacity to understand and direct the terms of a will made by a man eighty-six years of age to change a former will, is not inconsistent with an insane delusion causing such change.—*Harbison v. Beets*, 84 Kan. 11, 113 Pac. 423. That a delusion may be such as will deprive a testator of testamentary capacity it must be the spontaneous product of the subjective processes of a disordered intellect, inducing a belief without any support in extrinsic evidence. A mere error in judgment upon proven or admitted facts does not constitute a delusion, however much it may be at variance with the conclusion reached by unprejudiced minds from the same facts.—*Stevens v. Myers*, 62 Or. 372, 121 Pac. 438. A "delusion," such as invalidate a testamentary disposition made while laboring under it, is a fixed belief in a proposition which has no foundation in evidence, and which is so extravagant that a reasonable man would not adhere to it.—*In re Sturtevant's Estate*, *Sturtevant v. Sturtevant*, 92 Or. 269, 178 Pac. 192, 180 Pac. 595. The rule in respect to the sufficiency of a belief, influencing a testator to withhold benefits from persons expectant of them, is similar to the rule in respect to the verdict of a jury, which is that the latter must stand if there is any evidence to support it; if there is any evidence to support the belief, it is not a "delusion."—*In re Sturtevant's Estate*, *Sturtevant v. Sturtevant*, 92 Or. 269, 178 Pac. 192, 180 Pac. 595. A mental delusion under which a testator has cut off a son of his, invalidates the will only in case there was no existing fact whereby a basis could be afforded for his judgment, without having a delusion imputed to him.—*In re Sturtevant's Estate*, *Sturtevant v. Sturtevant* 92 Or. 269, 178 Pac. 192, 180 Pac. 595. A delusion, such that the possession of it may incapacitate a testator,

is a mental conception without basis of fact; a misjudgment of facts or an accentuated opinion founded upon insufficient facts is not a delusion.—*In re Diggins's Estate*, *Diggins v. Diggins*, 76 Or. 341, 149 Pac. 73.

(7) **Exists when.**—A person, able to understand and to carry in mind the nature and situation of his property and his relation to his relatives and those around him, with clear remembrance as to those in whom, and those things in which, he has been mostly interested, capable of understanding the act he is doing, and the relation in which he stands to the objects of his bounty, free from any delusion—the effect of disease—which might lead him to dispose of his property otherwise than he would if he knew and understood what he was doing, has the capacity to make a will.—*In re Ross' Estate*, 173 Cal. 178, 159 Pac. 603. If a testator has sufficient mind to know the extent and value of his property, the number and names of the persons who are the natural objects of his bounty, their deserts with reference to their conduct and treatment toward him, their capacity and necessity, and has sufficient memory to retain all such facts in his mind long enough to have his will prepared and executed, he has testamentary capacity.—*Lehman v. Lindenmeyer*, 48 Colo. 305, 109 Pac. 958. To be of sound and disposing mind and memory so as to be capable of making a valid will, it is sufficient if the testator has an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, and the persons who are the objects of his bounty, and the manner in which it is to be distributed.—*In re Huston's Will*, 163 Cal. 166, 124 Pac. 852. There is no necessary and compelling force in established physical infirmity which carries with it the inference of mental incapacity to make a will. A person may be very feeble or aged and infirm from disease, and yet be capable of disposing of his property.—*Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597. It is the settled rule in Oregon that if a testator, at the time he executes his will understands the business in which he is engaged, and has a knowledge of his property and how he wishes to dispose of it among those entitled to his bounty, he possesses sufficient testamentary capacity.—*Stevens v. Myers*, 62 Or. 372, 121 Pac. 437. Testamentary capacity is possessed by one who is in a condition to understand what he is doing, to recall what property he owns, and to intelligently select the objects of his bounty.—*In re Hart's Will*, 65 Or. 263, 132 Pac. 526. Mental competency is sufficient in a testator if, when making his will, he knows what he is doing and to whom he is giving his property, regardless of his being or not being capable of making a contract or of managing his estate.—*In re Sturtevant's Estate*, *Sturtevant v. Sturtevant*, 92 Or. 269, 178 Pac. 192, 180 Pac. 595. Evidence held to show that testatrix possessed testamentary capacity when she signed her will.—*In re Miller's Estate*, 37 Mont. 545, 97 Pac. 935. Testamentary capacity is possessed by one who, though he may be in a weakened condition physically, is nevertheless capable

and sound mentally and fully understands the contents of the will and the disposition of his property therein provided.—*In re Hobbin's Estate*, 41 Mont. 39, 108 Pac. 8. As to whether the amount of mental capacity to make a will can be compared with that required to make a contract the conclusion of common sense is that it requires more mind to make some wills than to make some contracts and vice versa, and there is excellent authority for the rule that while contractual capacity implies *prima facie* the capacity to make a will, yet neither is a test for the other.—*Murphy v. Nett*, 47 Mont. 38, 130 Pac. 455.

4. Formalities and execution.

(1) *In general*.—The form in which a will is drafted is no part of its execution, and the legislature has not attempted to prescribe the form in which the testator shall express his testamentary purpose, or in which the will shall be drafted, but only the form in which it is to be executed and attested.—*Estate of Seaman*, 146 Cal. 455, 106 Am. St. Rep. 53, 2 Ann. Cas. 726, 80 Pac. 700, 702; *Estate of Blake*, 136 Cal. 306, 89 Am. St. Rep. 135, 68 Pac. 827. While it is desirable to give effect to the wills of deceased persons, regardless of formality and mistakes occurring through ignorance, where all the requirements of the statute have been complied with, and the intent of the testator is clear, it would be a dangerous precedent to establish, to hold an instrument lacking in the statutory requirements, to be such a valid will as conveys real estate.—*Osborne v. Atkinson*, 77 Kan. 435, 94 Pac. 796, 798. No set form of expression is necessary to constitute a will. All that is required to make an instrument testamentary is that it should show when read in connection with surrounding circumstances and facts, a testamentary intention.—*In re Noye's Estate*, 40 Mont. 231, 106 Pac. 358. Where the testator is proved to have signed the instrument, and that the persons whose names appear as attesting witnesses, signed the usual certificate of attestation, setting forth in detail a full compliance with the several statutory provisions in relation to execution, including the fact of publication, there arises a strong presumption that every one of the statutory requirements was complied with.—*In re Taylor's Estate*, *Ross v. Taylor*, 39 S. D. 608, 612, 165 N. W. 1079. The rule that the intention must govern, which applies to the interpretation of wills, does not apply to their execution.—*In re Taylor's Estate*, *Ross v. Taylor*, 39 S. D. 608, 165 N. W. 1079. Where a will has not been subscribed at the end thereof, the failure to comply with the statutory requirements for making a will can not be cured by evidence that the testator intended to execute a will.—*Estate of Dutcher*, 172 Cal. 488, 157 Pac. 242. Illustration of evidence sufficient to establish the due execution of a will.—*Wendl v. Fuerst*, 68 Or. 283, 288, 136 Pac. 1. A will, proper otherwise, may be on detached sheets of paper, coherence and internal sense being deemed in general sufficient to constitute a proper connection.—*Estate of Tyrrell*, *Knauff v. Davidson*, 17 Ariz. 418, 428, 153 Pac. 767. It is not an insurmountable objection to

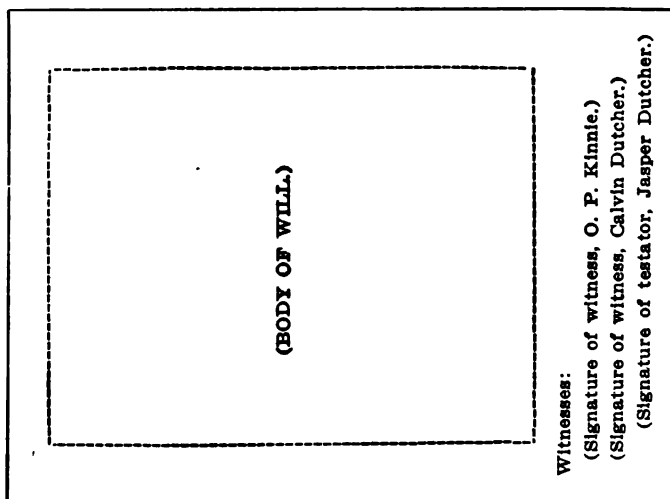
the due execution and attestation of a will that the character of the instrument was declared and the witnesses were asked to witness, through an interpreter, translating between the testator and the witnesses.—*Bell v. Davis*, 55 Okla. 121, 155 Pac. 1132, 1135. The execution and attestation of a will through an interpreter will be scrutinized carefully, and the court must be clearly convinced that the testator was fully and accurately advised as to the contents of the will, and that it sets forth his testamentary intentions by disposing of his property as he desires.—*Bell v. Davis*, 55 Okla. 121, 155 Pac. 1132, 1135. Where three sheets of paper of the same size and character and apparently torn from the same writing pad, all written upon, folded together and placed in a locked drawer, and all bearing writing entirely in the hand of the deceased person, and all arranged and folded together in proper sequence, though not mechanically bound together, a finding that the three sheets of paper form a continuous instrument constituting the last will and testament of such decedent is sufficiently sustained.—*Estate of Merryfield*, 167 Cal. 729, 731, 141 Pac. 259. The prescribed manner of disposal must be observed with at least substantial strictness.—*In re Price's Estate*, 14 Cal. App. 462, 112 Pac. 482. Conflicting evidence held to sustain finding of due execution and publication of codicil.—*In re Weber's Estate*, 15 Cal. App. 224, 114 Pac. 597. A series of three letters, written by a woman in prospect of going to a hospital to undergo a surgical operation, held as constituting a will.—*Estate of Cook*, 173 Cal. 465, 160 Pac. 553. The courts have no right to dispense with proof of any of the statutory requirements for the making of wills; but, in determining what is required, regard should be had to the essential purpose of the legislature rather than a strict and rigid reading of the form of the words used.—*Estate of Cullberg*, 169 Cal. 365, 146 Pac. 888.

REFERENCES.

Attestation of will.—See note 1 L. R. A. (N. S.) 393. The attestation and witnessing of wills.—See note 114 Am. St. Rep. 209-239. Formal execution of will, what law governs.—See note 8 L. R. A. 823-827. Instrument, when a will.—See note, *Wilson v. Carico*, 49 Am. St. Rep. 221. Sufficiency of letter as will.—See note 15 L. R. A. 635. Testamentary writings or wills, as to what constitute.—See notes 92 Am. Dec. 284, 30 Am. St. Rep. 717, 89 Am. St. Rep. 486-500. Valid testamentary disposition, requisites of.—See note 1 Am. & Eng. Ann. Cas. 51. What is a sufficient execution, by will, of a power of appointment.—See note 64 L. R. A. 849-918. Consult note to the following sections of *Kerr's Cal. Cyc. Civ. Code*, as to the subjects indicated. Will of married woman, § 1273; several testamentary instruments, when taken and construed together, § 1320; wills, elements of, formalities as to execution, § 1270; execution and attestation of wills, generally, § 1276.

(2) *Signature of testator*.—The purpose of the statute which requires that the testator's name shall be subscribed at the end of the

will, is not only that it may thereby appear upon the face of the instrument, that the testamentary purpose, which is expressed therein, is a completed one, but also to prevent any opportunity for fraudulent or other interpolations between the written matter and the signature.—Estate of Seaman, 146 Cal. 455, 106 Am. St. Rep. 53, 2 Ann. Cas. 726, 80 Pac. 700, 702. When a testator attests a will by his mark, it is a sufficient signing, and is a valid mode of executing the will.—Pool v. Buffman, 3 Or. 428, 442. The language of the code providing that the testator may, "when the person can not write," make his mark, includes all persons who are unable to write from any cause, even though they know how to write.—In re Guilfoyle's Will, 96 Cal. 590, 31 Pac. 553, 554. A mark made by a testatrix is regarded as a subscription to the testament sufficient to satisfy the requirement of the statute; and the name written by another is required to be only near enough to the mark to indicate that the mark was intended to represent the name.—In re Guilfoyle's Will, 96 Cal. 589, 31 Pac. 553. The statute does not make the order of signing a will material; it is immaterial whether the testator signed his name before or after the witnesses signed their names to the document executed as a will, if it appears that all the parties signed it at the same time and as part of the same transaction.—Estate of Silva, 169 Cal. 116, 145 Pac. 1015. The statute does not require that the signature of the testator to his will shall occupy any specific place with reference to the signatures of the witnesses, and a signature of the testator written a short distance below the body of the will was subscribed "at the end thereof" although made below the signatures of the witnesses, as shown in the accompanying diagram.—Estate of Dutcher, 172 Cal. 488, 489, 157 Pac. 242.



"The evidence showed without conflict that the testator signed first, and that Kinnie and Calvin Dutcher then signed as witnesses.—Estate of Dutcher, 172 Cal. 488, 157 Pac. 242.

The statute of the state of Washington, requiring that a person signing a will for the testator shall subscribe his own name as witness, applies only to cases where, at the testator's request, this person writes the name for the testator; it has no application to the case of a signing by mark.—*Wilson v. Craig*, 86 Wash. 465, Ann. Cas. 1917B, 871, 150 Pac. 1179. The statutory requirement that a person, signing the testator's name to a will at the testator's request, must also sign his own name as a witness to the will, does not apply to a person who simply assists the testator in signing by mark.—*Points v. Nier*, 91 Wash. 20, 157 Pac. 44. Under the statute of the state of Washington, providing for the signing of a will by a testator, there is no reason why his signing by mark is not valid.—*Wilson v. Craig*, 86 Wash. 465, Ann. Cas. 1917B, 871, 150 Pac. 1179. A last will and testament can be signed by a mark, though the testator has assistance in making the mark, and it is immaterial that his name was also signed thereto by another.—*Points v. Nier*, 91 Wash. 20, 157 Pac. 44. It is a sufficient subscription to a will in conformity with the statute of Montana, section 4726, when a person capable of making a will who, when she held the pen in her hand knew that she was signing her will and, with the assistance of another person at her request, signed her name to the will.—*In re Miller's Estate*, 37 Mont. 545, 97 Pac. 937. If a testator have mental capacity the execution of the will is not insufficient because of his making his mark when his name is written by another; the hand may be guided or the signature written by another, the testator making his mark, without impairing the validity of the signature, provided it is done in his presence and by his direction.—*Ahnert v. Ahnert*, 98 Kan. 768, 160 Pac. 201. Where a testatrix, with the undoubted intention to make her will, caused her name to be subscribed thereto by a third person in her presence and by her direction, such subscription, although the third person omitted to write his name as a witness to the will, is sufficient to effect its due execution, under sections 1276 and 1278 of the Civil Code of California.—*Estate of Dombrowski*, 163 Cal. 290, 125 Pac. 233. The validity of such a subscription is not affected by the fact that at the time thereof and as part of the same transaction the testatrix also subscribed her mark to the will, but that the signing by mark was incomplete and ineffectual for want of compliance with the requirement of section 14 of the Civil Code of California, that where a subscription is by mark, the name of the person so signing is to be written near the mark, by a person "who writes his own name as a witness."—*Estate of Dombrowski*, 163 Cal. 290, 125 Pac. 233. Testator signing by mark after the writing of his name by request and at his direction constitutes a valid and sufficient execution of the will, notwithstanding the fact that the person who thus writes the testator's name fails to write his own name as a witness thereof, as

required by section 14 of the Civil Code of California.—In *Matter of Dombrowski's Estate*, 163 Cal. 290, 125 Pac. 233, citing and approving *Estate of Toomes*, 54 Cal. 509, 35 Am. Rep. 83, and *Estate of Langan*, 74 Cal. 353, 16 Pac. 188, and distinguishing *Robertson v. Hill*, 127 Ga. 175, 56 S. E. 289; *Maine v. Ryder*, 84 Pa. 217; *Plate's Estate*, 148 Pa. 55, 33 Am. St. Rep. 805, 23 Atl. 1038; *Waller v. Waller*, 1 Gratt. (Va.) 454, 42 Am. Dec. 564, and *Everhart v. Everhart*, 34 Fed. 82. The evidence examined and held to sustain the finding that when the testator signed his will by having his hand aided and steadied by another, he did not know what he was signing was supported by substantial evidence.—In *re Gordon's Estate*, 40 Nev. 300, 161 Pac. 717, 720. The fact that the signature to a will was intended as an executing signature, wherever placed, must satisfactorily appear on the face of the document itself.—*Estate of Manchester*, 174 Cal. 417, Ann. Cas. 1918B, 227, 163 Pac. 358. No two signatures are precisely alike, even though made by the same hand; and, where the decedent's admitted signature is offered for comparison, by persons who would uphold a disputed will, a forgery is apparent if, one signature being superimposed upon the other, the lines of the two signatures exactly conform.—In *re Connolly's Estate*, *Farley v. Hopkins*, 89 Wash. 168, 154 Pac. 155.

REFERENCES.

Comparison of marks and spelling in wills and other writings.—See note 65 L. R. A. 95-100. Does ability to write invalidate signature made by mark or by aid of other person guiding the pen.—See note 7 L. R. A. 1193-1195. Signing wills by marks.—See note 22 L. R. A. 370-372. Signature of testator "at end" of will.—See note 2 Am. & Eng. Ann. Cas. 730. Writing name in body of will as a signature thereto.—See note 29 L. R. A. (N. S.) 63, 30 L. R. A. (N. S.) 1173, 46 L. R. A. (N. S.) 552. When will deemed to have been signed or subscribed at the end.—See 17 L. R. A. (N. S.) 353-360.

(3) **Publication by testator.**—The declaration of the testator in the words, "That is my will," made in reference to the instrument, and in the presence of witnesses, is a sufficient publication, under the provisions of the statute.—*Estate of Mullin*, 110 Cal. 252, 42 Pac. 645, 646. An express declaration and request to the subscribing witnesses are not absolutely required of the testator. The requirement of the statute is complied with if, at the time, he did, by words or conduct, convey to them the information that the instrument was his will, and that he desired them to attest it as witnesses.—*Estate of Johnson*, 152 Cal. 778, 93 Pac. 1015, 1016. The formality of publication by the testator, in any manner, is not, under the Oregon statute, a prerequisite to the validity of a will.—*Skinner v. Lewis*, 40 Or. 571, 67 Pac. 951, 953. Where the attestation clause in a will stated that the will was signed and published as and declared to be the last will of testatrix in the presence of the attesting witnesses who signed at her request and in the presence of each other and one of the attesting witnesses testified that testa-

trix said in the presence of the other attesting witness that she knew she was executing her will and was corroborated and the other attesting witness testified that he did not hear testatrix say anything about making a will and that she did not ask him to sign as a witness, held sufficient to show that testatrix at the time of subscribing the will declared that the instrument was her will, as required by the Rev. Codes of Montana of 1907, section 4726.—*In re Miller's Estate*, 37 Mont. 545, 97 Pac. 936. In the attestation of a will, it is essential that there be a compliance with the statutory provision that the testator must, at the time of subscribing or acknowledging the instrument, declare to the attesting witnesses that it is his will.—*In re Williams' Estate*, *Williams v. Davis*, 50 Mont. 142, 145 Pac. 957. Where it is required by statute that a testator must declare that the "instrument is his will," there must be some declaration of the sort by the testator, and it must be made to each of the witnesses; however, it need not be made by word of mouth; if made by sign or motion, that may fairly be construed as a communication.—*In re Taylor's Estate*; *Ross v. Taylor*, 39 S. D. 608, 611, 165 N. W. 1079. In declaring a written instrument to be his will in the presence of the attesting witnesses, so as to satisfy the statute, it is not indispensable that the testator use actual, spoken words, but he may indicate his meaning by signs or actions.—*Edwardson v. Gerwien* (N. D.), 171 N. W. 101, 102. It is not necessary that the testator should have spoken words declaring the document to be his will or that he should expressly request the witnesses to sign it as such, provided the declaration and request are indicated unmistakably by his actions or conduct.—*Estate of Cullberg*, 169 Cal. 365, 146 Pac. 888. The testator need not speak words declaring the document to be his will, and need not expressly request the witnesses to sign it as such. It is sufficient if this declaration and request are unmistakably indicated to the persons signing as witnesses by the testator's actions and conduct, although there be no declaration in words to that effect.—*Estate of Silva*, 169 Cal. 116, 145 Pac. 1015. There is sufficient evidence of the execution of a will, if testimony is given to the effect that the decedent stated that he wished to make a will; that he asked a named person to write it; that such person thereupon wrote out the paper and handed it to the decedent; that the decedent signed it and passed it back to the person who had written it out; that such person then signed as a witness and handed the paper to a third person, and that this latter person also signed as a witness. There is, to be sure, nothing here to show a verbal declaration by the decedent that he intended the paper to be his will, or a verbal request that the others sign as witnesses, but the manner and actions of the decedent were equivalent to such declaration and request in words.—*Estate of Silva*, 169 Cal. 116, 145 Pac. 1015. Where it is not alleged that a testator was under any disability at the time of making a codicil, the publication of such codicil amounts to an affirmance and republication of the will.—*Stevens v. Myers*, 62 Or. 372, 121 Pac. 443. If a will, made in 1909, was otherwise

sufficiently identified as the one to which the testator referred in a codicil, dated in 1914, although his marriage in the meantime left the former instrument, if standing alone, without effect because of the provisions of section 1299, Civil Code of California, the will was sufficiently republished by the codicil, subject to certain changes made therein by the terms of the latter.—*Estate of Seller*, 176 Cal. 771, 772, 170 Pac. 1138. If a prior will or codicil is utterly inconsistent with a subsequent will or codicil, that is inconsistent and repugnant throughout, the former is not revived and republished.—*Freeman v. Hart*, 61 Colo. 455, 466.

(4) *Subscribing witnesses*.—A subscribing witness must not only subscribe his name as a witness to the writing, but must attest the signature of the testator, who must sign the will in his presence, or acknowledge to him by word or act that he has signed it.—*In re Mendenhall's Will*, 43 Or. 542, 73 Pac. 1033, 1034, citing *Luper v. Werts*, 19 Or. 122, 126, 23 Pac. 850, 852. Where the statute provides that a will must be attested and subscribed by two or more competent witnesses, it is as essential that the writing should be so subscribed, as that it shall be signed by the testator in order to be a valid will.—*Clark v. Miller*, 65 Kan. 726, 68 Pac. 1071, 1072. The attestation of a will is not a matter of great importance to the witnesses, and the failure of such persons to remember the occurrences, is not so unusual as to justify the refusal of probate on that account, if there is other satisfactory evidence of the due execution.—*Estate of Johnson*, 152 Cal. 778, 93 Pac. 1015, 1018. A will is not void because the name of the subscribing witnesses was written by another person. The omission of a mere formality or empty ceremony, no trace of which can be found on the will itself, does not defeat the attestation.—*Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738, 739. A necessary subscribing witness to a will can not take a devise thereunder.—*In re Klein's Estate*, 35 Mont. 185, 88 Pac. 798; *Clark v. Miller*, 65 Kan. 726, 68 Pac. 1071, 1072. The subscription to a will, or its acknowledgment, must be made, under the California statute, before the two witnesses present at the same time; the will is not sufficiently attested if one witness attests it at one time and the other attests it at another time, the two not signing in the presence of each other.—*In re Emart's Estate*, 175 Cal. 238, L. R. A. 1917F, 866, 165 Pac. 707. The attesting clause in a will must be read by or to a subscribing witness, in order that the recitals therein may be given weight.—*In re Taylor's Estate*, *Ross v. Taylor*, 39 S. D. 608, 612, 165 N. W. 1079. It is settled that not even an act or motion indicating acquiescence by the testator in the request of a third person to the witnesses to sign is necessary, where it is made in his presence, and he knows that the witnesses are signing in response to such request, and makes no objection.—*Estate of Cullberg*, 169 Cal. 365, 369, 146 Pac. 888. If after the signing of the document by the testator, it first having been read to him, the nurse and physician are requested, openly in his presence, to sign as witnesses, he acquiescing by silence, this may be

interpreted as a request on his part that they do so.—*Estate of Cullberg*, 169 Cal. 365, 146 Pac. 888. It is not required that a witness to a will become such by express request of the testator; the request may be indicated by acts or gestures, or anything implying knowledge and free assent.—*Points v. Nier*, 91 Wash. 20, 157 Pac. 44. All the surrounding facts should be considered in determining whether section 4726 of the Rev. Codes of Montana of 1907 has been complied with so as to carry out the intent with which it was adopted and it is not essential that the testator should have expressly asked the subscribing witnesses to sign or to have expressly declared the instrument to be his will.—*In re Millers Estate*, 37 Mont. 545, 97 Pac. 941. Where one of the subscribing witnesses did not hear the will read, was not requested by any one to sign as a witness to the writing as a will, did not see the signature of the testator, and was not informed of the character of the paper until nearly two years afterward, the testator did not within the meaning of the statute, either make publication of the writing as his will nor request both witnesses to attest it.—*In re Noye's Estate*, 40 Mont. 190, 20 Ann. Cas. 366, 26 L. R. A. (N. S.) 1145, 105 Pac. 1017. Where the codicil of a will was admitted to probate on the testimony of one of the witnesses in due form to its execution, and such witness changed his evidence on the contest of its probate, and sustained the contestant, the court properly confirmed the probate not only on the original evidence received at the probate, but also on the further testimony of the executor who was present when the will was executed, and heard the testator declare in the presence of both the witnesses that he was executing the codicil to his will, and requested the witnesses to sign their names as witnesses, which they did together in his presence.—*Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597. The wife of a beneficiary is a competent witness to attest the execution of a will and she has no such interest thereunder as will impose upon her husband a forfeiture of his legacy because she was such witness.—*White v. Bower*, 56 Colo. 575, Ann. Cas. 1917A, 835, 136 Pac. 1054. In cases where some years have intervened between the execution of a will and the offer of it for probate, it is not to be expected that the witnesses shall agree as to every circumstance attending the execution, nor that both witnesses shall prove the facts essential to a statutory execution. If there is sufficient evidence to enable the court to conclude that the decedent conveyed to the others in some way his intending the paper to be his will and his desire for them to attest it, there is no need of anything more; the law does not require that all the witnesses shall testify without conflict concerning the execution of the will.—*Estate of Silva*, 169 Cal. 116, 120, 145 Pac. 1015.

REFERENCES.

Signature of witnesses to will before testator signs it.—See note 26 L. R. A. (N. S.) 1126. Necessity that witnesses see testator sign, or that they see his signature.—See note 38 L. R. A. (N. S.) 161. Trustee or member of a charitable beneficiary as a witness to the will.—See

note 36 L. R. A. (N. S.) 504. Whether the competency of an attesting witness to a will is to be determined as of the time of attestation or of probate.—See note 35 L. R. A. (N. S.) 686. Subscription to will by testator and witnesses, order of.—See note 5 Am. & Eng. Ann. Cas. 463. Subscription to will by witnesses, sufficiency of.—See note 4 Am. & Eng. Ann. Cas. 637. Subscription by witnesses to will in "presence" of testator, what constitutes.—See note 6 Am. & Eng. Ann. Cas. 414. Signature of witnesses to will before the testator signs it.—See note 14 L. R. A. 160. Subscribing witnesses to will, competency of.—See note Kerr's Cal. Cyc. Civ. Code, § 1280.

(5) *Attestation by witnesses.*—The attestation is not a matter of mere formality in affixing one's name to the will as a witness. There must be an active mentality connected with it. The witness must be able to say, surely and unequivocally, that the signature to the instrument, previously appended, is that of the person executing.—In re Skinner's Estate, 40 Or. 571, 583, 62 Pac. 523, 67 Pac. 951, 954; cited and affirmed, In re Mendenhall's Will, 43 Or. 542, 73 Pac. 1033, 1035. The purpose of attestation is to make certain that the will offered for probate is the one that was actually executed, and also to surround the testator with witnesses of his own choice, capable of judging and testifying as to his capacity to make a will.—Schnee v. Schnee, 61 Kan. 643, 60 Pac. 738, 740. A testator who, by reason of paralysis, is unable to speak, may convey his consent to the provisions of a will prepared at his request, and attest his assent by signs, with the same result as if he could have given full and connected directions.—Rothrock v. Rothrock, 22 Or. 551, 30 Pac. 453, 454. "Mere silence" is not enough to show acknowledgment.—Luper v. Werts, 19 Or. 122, 136, 23 Pac. 850. An attestation clause to a will, not read by or to an attesting witness, is of no effect.—Kettleson's Estate v. Kettleson (S. D.), 173 N. W. 161. To make the attestation of a will valid, it will not suffice for some other person to inform the witness at the time as to the authorship of the instrument; the information must come from the testator.—In re Williams' Estate, Williams v. Davis, 50 Mont. 142, 145 Pac. 957. Where a woman was shown a paper, unsigned, by another person, who stated that it was his will, and that he wanted her to sign it as a witness, which she accordingly did, after which he took the paper away again, still unsigned by him, and the woman can not identify the other's signature, the attestation is a nullity.—In re Jones' Estate, 101 Wash. 128, 172 Pac. 206. If one witness to a will sign in the forenoon and the other in the afternoon of the day of execution, the two not signing in the presence of each other, the attestation is not valid, under section 1276 of the Civil Code of California.—Estate of Smart, 175 Cal. 238, L. R. A. 1917F, 866, 165 Pac. 707. A person who subscribes a will as an attesting witness, must do so under the eye of the testator, or at least within his view.—In re Jones' Estate, 101 Wash. 128, 172 Pac. 206. If witnesses when attesting the execution of a will are in such a place that the testator can see them, if he chooses, they are in his presence

within the meaning of the statute.—*In re Burnham's Will*, 24 Colo. App. 131, 134 Pac. 257. Where a man went to a neighbor's house and asked for him, saying to the neighbor's wife that he had a paper for him to sign, and then, the husband not being at home, asked her to sign for her husband, which she then did, writing her husband's name, and doing so indoors while the visitor remained outside where he could not see her, this did not satisfy the statute relating to the attestation of wills.—*In re Jones' Estate*, 101 Wash. 128, 172 Pac. 206. Although a will has no attesting clause and the attesting witnesses simply signed their names thereto without even designating in the instrument that they signed as witnesses, its due execution, in the absence of evidence to the contrary, is sufficiently proved by the testimony of one of the witnesses, the other not being procurable, to the effect that the will was prepared by him at the dictation of the testatrix, that he signed his name thereto at her request, and that he and the other witness thereupon signed it as such, notwithstanding that he was unable to recollect whether the testatrix at the time the will was executed made any declaration as to the instrument being her will, or whether she asked him and the other subscribing witness to sign it as such.—*Estate of Kent*, 161 Cal. 142, 118 Pac. 523. Where the memory of witnesses is at fault in establishing a real or necessary incident attending the formal execution of a will, the attestation clause comes to the support of its validity and the law will presume a due execution from the recitation of the requisite facts therein, or even without it, upon the hypothesis that the requirements of law have been duly observed and in a holographic will this presumption is particularly applicable.—*Simpson v. Durbin*, 68 Or. 518, 136 Pac. 348. If the attesting witnesses when called, admit their signatures, but through defect of memory, or for any other reason, fail to testify to the due execution of the will, it may be established on the presumption arising from the form of the attesting clause, unless there be affirmative evidence given to disprove its statements.—*Butcher v. Butcher*, 21 Colo. App. 416, 122 Pac. 400.

REFERENCES.

Witnessing execution of will, formalities as to.—See note *Kerr's Cal Cyc. Civ. Code*, § 1278.

(6) Appeal.—The question of due execution of a will is a question of fact, and its determination by the trial court is not to be overthrown on appeal unless without support in the evidence.—*Estate of Cullberg*, 169 Cal. 365, 146 Pac. 888.

5. Validity of wills.

(1) In general.—There is a valid execution of a will where the person undertaking to make it has done certain acts with the intention of thereby executing it, leaving undone nothing which he undertook to do to carry out that intention, and the acts done include everything necessary, under our statutes, to the execution of a will.—*Estate of Dom-*

browski, 163 Cal. 290, 125 Pac. 233. Under the provisions of the Nevada statutes providing that no will shall be valid unless in writing and signed by the testator, or by some person in his presence, and by his express direction, a testator's signature to his will written with the aid of another, at the testator's request, in steadying the testator's hand, is valid.—*In re Gordon's Estate*, 40 Nev. 300, 161 Pac. 717, 718. A testator must know the contents of his will; if he does not understand the English language, and a will, written in that language is prepared at the direction of his son, and read to him, without informing him of its contents, it can not be admitted to probate.—*Kittleson's Estate v. Kittleson* (S. D.), 173 N. W. 161. The fact that a testator believes that the instrument he has prepared is a valid will properly executed does not make it such.—*Estate of Manchester*, 174 Cal. 417, Ann. Cas. 1918B, 227, 163 Pac. 358. The signature to a last will and testament is not invalid by reason of another having aided the hand of the testator if the latter, at the time of requesting or receiving the aid, was fully aware of the contents of the instrument and was desirous of signing it.—*In re Gordon*, 40 Nev. 300, 304, 161 Pac. 717. Where it is proved that the testator signed without knowing the thing signed to be his will; that the contents of the instrument were wholly the suggestions of minds other than his; and that his hand in the act of signing was in the manual control of another person, the will is void for the testator's lack of sound and disposing mind.—*Darby v. Hindman*, 79 Or. 223, 153 Pac. 56. An instrument which purports to be a will and which contains an expression of the testator's own will and purpose, will be upheld as a valid will where the testimony shows the instrument was properly executed, free from any improper influence or control by the defendant or by any one else.—*Nordman v. Nordmark*, 100 Kan. 522, 164 Pac. 1062. A will is not invalidated by the fact that some of the testator's wishes, expressed therein, were indicated by affirmative signs made in response to questions; in such cases, however, proof must be had of spontaneous action and volition on the testator's part.—*Estate of Clark*, 170 Cal. 418, 149 Pac. 828. A will, in order to be valid, must be executed in accordance with the statutory requirements.—*In re Taylor's Estate*, *Ross v. Taylor*, 39 S. D. 608, 611, 165 N. W. 1079. A will by a property owner, made in anticipation of marriage and in fraud of the intended wife, will be set aside; but one by him made long prior to a second marriage and during the lifetime of his first wife can not be in fraud of the second wife.—*Lewis v. Lewis*, 104 Kan. 269, 178 Pac. 421. The valid execution of the will can not be defeated by the act of the witnesses in thereafter inserting their names above that of the testator.—*Estate of Dutcher*, 172 Cal. 488, 490, 157 Pac. 242. The right of making testamentary disposition of property is not an inherent one, or one enjoyed by virtue of the constitution; it is wholly statutory, and, since the legislature has imposed requirements upon testators in respect to the execution of wills, it is an absolute necessity that these shall have been complied with in order

that an instrument offered as a testament may be valid.—*Estate of Carpenter*, 172 Cal. 268, L. R. A. 1916E, 498; 156 Pac. 464. A testator may be a sufferer from some mental impairment, as the result of old age and disease, and yet retain sufficient independent mentality to know what he wishes to do with his property and that a will he is preparing expresses the wish; if so, his will is good.—*In re Sturtevant's Estate*, *Sturtevant v. Sturtevant* (Or.), 178 Pac. 192, 180 Pac. 595.

REFERENCES.

See subdivision on wills in form of deeds, head-line 8, *infra*.

(2) *Instruments informally executed*.—An instrument purporting on its face to be a will, but which passes no interest, and in terms gives no estate during the life of the makers, but expressly provides that the person in whose behalf the instrument was made shall have that, and that only, of which the makers die possessed, and which instrument was not attested or subscribed in the presence of the parties making the same, by two or more competent witnesses, or by any person other than the makers, is utterly void, either as a conveyance or a will.—*Poore v. Poore*, 55 Kan. 687, 41 Pac. 973, 974. Upon the back of a note payable on demand there was an unsigned memorandum to the effect that, if the note was not paid in full before the payee's death, the makers should expend the amount due on the note for the payee's funeral expenses and for a monument, and for caring for the lot in which he was buried. It was held that the terms of the memorandum, under the facts of this case, did not constitute a defense to the note, although complied with after the payee's death, as such memorandum was a testamentary disposition of property, and invalid unless made by will.—*Moore v. Weston*, 13 N. D. 574, 102 N. W. 163. A will not executed in conformity with the requirements of the statute is void.—*Chestnut v. Capey*, 45 Okla. 754, 146 Pac. 589. The statutes regulating the execution of wills are mandatory, and a will executed otherwise than in strict compliance with them is void.—*In re Wolcott's Estate* (Utah), 180 Pac. 169. An instrument produced as a will, but as to which there has been no due publication as a last will and testament, is not a will.—*In re Williams' Estate*, *Williams v. Davis*, 52 Mont. 192, Ann. Cas. 1917E, 126, 156 Pac. 1087. The will of a full-blood Indian member of the Five Civilized Tribes, of the kind that requires acknowledgment and approval in conformity with the act of congress, but which is not so acknowledged and approved, is invalid and therefore not entitled to probate.—*In re Byford's Will* (Okla.), 165 Pac. 194. An unsigned will is not made effective by being enclosed in an envelope marked "my will," followed by the signature of the testator.—*Estate of Manchester*, 174 Cal. 417, Ann. Cas. 1918B, 227, 163 Pac. 358.

6. Codicils to wills.

(1) *In general*.—Dispositions made by will are not to be disturbed by a codicil further than is necessary to give it effect. The two are to

be read together so as to make one consistent whole.—Estate of Barclay, 152 Cal. 753, 93 Pac. 1012, 1014; Estate of Ladd, 94 Cal. 674, 30 Pac. 99; Estate of Scott, 141 Cal. 485, 75 Pac. 44. A clear disposition made by a will is not revoked by a doubtful expression or inconsistent disposition in the codicil. Thus, where a codicil relates only to a one-third share of the residuum of the estate, devised to a certain person, it can not affect the remaining two-thirds residuum of the estate, which was allowed to remain unaltered by it.—Estate of Dominici, 151 Cal. 181, 90 Pac. 448, 450. While a codicil which specifically changes the original will, must prevail, yet both the will and codicil must be construed together, and the general intent pervading both must be gathered.—Hunt v. Hunt, 18 Wash. 14, 50 Pac. 578, 580. A deed made by a testator three days after the execution of his will, reaffirming the provisions of the will, but which deed was not delivered, even though deemed to be a codicil to the will, does not prevail over another and subsequent codicil.—Pardee v. Kuster, 15 Wyo. 368, 89 Pac. 572, 573. An original holographic will may be changed by a letter in which the testator expressly referred to the will and expressed his intention and wish to change the same.—Barney v. Hays, 11 Mont. 571, 28 Am. St. Rep. 495, 29 Pac. 282. An antenuptial will may be given effect after marriage by a codicil, then duly executed and expressly intended to republish the will.—Estate of Cutting, 172 Cal. 191, Ann. Cas. 1917D, 1171, 155 Pac. 1002. Where the language of a codicil, made after marriage, to an antenuptial will goes to the effect that the instrument was executed on account of the marriage and in order to perform the promise made in an antenuptial agreement, the codicil is to be read as having for its sole object the realizing of that promise.—Estate of Cutting, 172 Cal. 191, Ann. Cas. 1917D, 1171, 155 Pac. 1002. Only such testamentary instruments as have for their sole purpose the complete destruction or obliteration of a will fall within the purpose and intent of section 7072, Rev. Stats. of Colorado, and a codicil which does not show any such intent, is not such a will or codicil as comes within the provisions of that section.—Freeman v. Hart, 61 Colo. 455, 465. No particular provision or codicil of a will can be singled out and denied probate, and a will and all its codicils must go together, and all being entitled to probate equally, must for that purpose stand as an entirety, and objections to any part may be determined, at the proper time and upon a full hearing.—Freeman v. Hart, 61 Colo. 455, 469. A purported codicil to a will witnessed by only one person, is of no force and effect, and it can not be vitalized by the proper execution of a subsequent codicil to the same will.—Freeman v. Hart, 61 Colo. 455, 466, 158 Pac. 305. The rule that a codicil executed subsequently to other codicils of the will, and executed properly, gives life to and republishes the will and the other codicils, however executed, has no application in cases where its provisions are repugnant to those contained in the other instruments.—Freeman v. Hart, 61 Colo. 455, 466, 158 Pac. 305.

(2) **Reference to the will.**—The execution of a codicil referring to a previous will has the effect of republishing the will, as modified by the codicil, and the two are to be regarded as forming but one instrument, speaking from the date of the codicil.—*Payne v. Payne*, 18 Cal. 302. The reference in a codicil must be certain, and to an instrument in existence at the time of the admission of the will to probate, in order to make it, ipso facto, a portion of the will itself by such reference.—*Estate of Willey*, 128 Cal. 1, 60 Pac. 470, 473. Where a will was filed and presented for probate, but the same was refused probate, and, pending an appeal from the order refusing probate, a codicil to the will was discovered, the will together with the codicil may be presented again for probate after the withdrawal of the original application.—*Barney v. Hays*, 11 Mont. 99, 27 Pac. 384, 386. The fact that a codicil is written upon a sheet of paper containing a writing which purports to be testamentary in character, is sufficient to justify the inference that such writing is the will referred to by the codicil.—*Estate of Plumel*, 151 Cal. 77, 121 Am. St. Rep. 100, 90 Pac. 192, 193. If in a duly executed codicil to a will the testator ratifies and confirms the terms of the will except where inconsistent with the codicil, this amounts to a re execution of the will.—*Estate of Baird*, 176 Cal. 381, 168 Pac. 561. Where a testator, as of an antenuptial will, declared in a holographic paper after marriage, "I, hereby affirming my will, bearing date Oct. 22, 1912, except as herein modified, do hereby declare the following as and to be a codicil to my said will, being my last will and testament," the effect is to republish the will as of the date of the codicil.—*Estate v. Cutting*, 172 Cal. 191, 196, Ann. Cas. 1917D, 1171, 155 Pac. 1002. The execution of a codicil, which by its terms picks up a will previously executed, and in effect reaffirms it, expresses a testamentary intent that the will and the codicil be taken together, and, in the absence of something to indicate a contrary intent, that any gift made by the codicil shall be subject to the conditions imposed by the will upon the testator's gifts generally.—*Estate of Hite*, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993; *In re Bergland's Estate* (Cal.), 182 Pac. 277, 278.

REFERENCES.

Codicil, reference by testator to his will.—See note 8 Am. & Eng. Ann. Cas. 429. Effect of codicil.—See note 1 L. R. A. (N. S.) 397. Republication of will by codicil.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1287.

7. **Incorporating other papers by reference.**—A will required to be witnessed by two or more persons, or executed with any other prescribed formalities, may nevertheless adopt an existing paper by reference. This incorporation of the paper referred to, into the will, so makes it a part of the instrument that no distinct proof of the paper or even filing, in the probate court, is required.—*Estate of Willey*, 128 Cal. 1, 60 Pac. 470, 473. Where a wife, in her will, directs distribution of the residue of her property "in accordance with the provisions made in

the last will of my husband concerning the same," the wife thus adopts and makes the husband's will a part of her own will by reference, though the husband's will was admitted to probate several years before the wife's will was written.—*Gerrish v. Gerrish*, 8 Or. 351, 353, 34 Am. Rep. 585. Any testamentary document may be incorporated into a will by reference, provided the language of the will clearly identifies the paper or renders it capable of identification.—*Estate of Vanderhurst*, 171 Cal. 553, 154 Pac. 5. A deed, delivered by the grantor, along with his properly executed will, which specifically refers to it, to a person other than the grantee, with instructions to deliver it to the grantee on the grantor's death, and at the same time to mail the will to the probate court, takes effect as part of the will.—*Shulsky v. Shulsky*, 98 Kan. 69, 157 Pac. 407. Where a testator makes, in his will, a distinct reference to a deed actually in existence at the time, and the will is properly executed, the deed becomes a part of the will.—*Shulsky v. Shulsky*, 98 Kan. 69, 157 Pac. 407.

REFERENCES.

Incorporation into will by reference, doctrine of.—See note 1 Am. & Eng. Ann. Cas. 395, 9 Am. & Eng. Ann. Cas. 105. Incorporation of extrinsic papers into wills.—See notes 107 Am. St. Rep. 70-75, 68 L. R. A. 353-386. Deed construed in aid of will.—See head-line 11, *infra*.

8. Wills in form of deeds.

(1) In general.—An instrument which is in form and substance a deed between two parties by which one grants and transfers to the other certain property, and which does not contain any of the usual words of devise or bequest, or any word equivalent thereto, is not a will, and can not be probated as such.—*Estate of Hall*, 36 Cal. 399, 400 (Nov. 13, 1908). In determining whether an instrument is a deed or a will, the question is: Did the maker intend to convey any estate or interest whatever to vest before his death, and upon the execution of the paper? Or, on the other hand, did he intend that all the interest and estate should take effect only after his death? If the former, it is a deed; if the latter, a will.—*Powers v. Scharling*, 64 Kan. 343, 67 Pac. 821; *Pentico v. Hays*, 75 Kan. 76, 9 L. R. A. (N. S.) 724, 88 Pac. 738, 739. And, where testamentary, it is revocable.—*Sappingfield v. King*, 49 Or. 102, 8 L. R. A. (N. S.) 1066, 89 Pac. 142, 144. If an instrument in writing passes a present interest in real estate, although the right to its possession and enjoyment may not accrue until some future time, it is a deed or contract; but, if the instrument does not pass an interest or right until the death of the maker, it is a will or testamentary paper.—*Reed v. Hazleton*, 37 Kan. 321, 15 Pac. 177, 180. An instrument in writing may be a contract as to property described therein, and a testamentary instrument, concerning other property described or referred to therein.—*Reed v. Hazleton*, 37 Kan. 321, 15 Pac. 177, 179. A deed, if in fact made a codicil to a will, must be construed as a part thereof, and in such construction the terms of the codicil later in date must govern it when

repugnant to, or in conflict with, the terms of the will or prior codicil; and, in this sense, the word "will" is used to mean will as first executed, together with all codicils, be they many or few, which have been added thereto, and the meaning and effect of which, taken together, is reaffirmed or changed by the last codicil. The will so changed or reaffirmed speaks from the date of its republication by the last codicil.—*Pardee v. Kuster*, 15 Wyo. 368, 89 Pac. 572, 573. A deed, not testamentary in form, does not take effect where the conduct of both parties to it indicates that there was no intent to pass title to any of the property until the death of the grantor; in this case, the evidence was held to be sufficient to justify the conclusion that a so-called deed was not intended as a present transfer of title, but was an attempted testamentary disposition of the land involved.—*Cox v. Schnerr*, 172 Cal. 371, 156 Pac. 509. Where a man executes a deed and intrusts it to his attorney for delivery to the grantee after his death, the execution being in compliance with a previous agreement whereby the grantee was to care for the grantor until the latter died, the attorney can not, after the grantor's death, withhold the deed from the grantee on the ground that the grantor has revoked it by will.—*James v. Lueders*, 97 Wash. 560, 166 Pac. 772. A woman who, on her deathbed, executes a deed which is afterwards found to name her husband as grantee, and, a few days before death informs her husband that she knows of its approach, saying to him then, "Go to that cupboard there and get me the envelope, a big envelope," and, on his obeying, inspects the envelope and says, as she passes it back to him, "that is the one; put that down in your tool chest and lock it, and put the key in your pocket; you know the girls don't like you," makes a valid delivery, in case the envelope contains the deed.—*McGowan v. Lockwood* (Colo.), 176 Pac. 298. Circumstances examined attending the execution of an instrument, claimed by the holder to be a deed, and a decision by the court thereupon that the maker of the instrument intended to dispose of the property by will; wherefore a cancellation of the instrument as a deed was decreed.—*Nelson v. Thomas*, 36 Cal. App. 433, 172 Pac. 398. In a proceeding by a son of a deceased person to set aside a deed of such person on the ground of undue influence, exercised by the grantee, the plaintiff may introduce in evidence letters, written to him by his father at or about the time of the transaction, to show the grantor's mental condition.—*Munger v. Myers*, 96 Kan. 743, 745, 153 Pac. 497. It is a fundamental rule that, whatever method of delivery of a deed is adopted, there must be a plain showing that the grantor, by acts or words, or both, intended to divest himself of title.—*Donahue v. Sweeney*, 171 Cal. 388, 153 Pac. 708. A girl, afflicted with a nervous illness and who had occasional spells which weakened her so that she did not know what she was doing or what was transpiring about her, was induced to deed land to her father without consideration, and testified that she had no intention of giving the land to her father, but signed the deed because she had

been led to think "somebody might get it away from me"; held, undue influence.—*Kruse v. Fredlum*, 96 Kan. 456, 152 Pac. 617.

REFERENCES.

See head-line 5, *supra*.

(2) **Testamentary character of instrument.**—A deed is in form and effect testamentary, if it provides that "this deed is made with the full understanding and upon the condition that the same shall take effect from, and after the death of the said grantor." Such a deed is revocable.—*Sappingfield v. King*, 49 Or. 102, 89 Pac. 142, 143. An instrument in form and substance a deed between two parties, by which one grants and transfers to the other certain property, and which does not contain any of the usual words of devise and bequest, nor any words equivalent thereto, is not a will, and is properly denied probate.—*Estate of Hall*, 149 Cal. 143, 84 Pac. 839, 840. An instrument in the form of a grant, bargain, and sale deed, which contains the express condition "that in the event the said party of the second part shall die before the death of the said party of the first part, then and in that event the estate hereby conveyed shall revert to and vest in the said party of the first part just as if this deed had not been made," and which deed reserves a life estate in the grantor, "and further reserving to himself the power to mortgage, incumber, sell, lease, convey, or otherwise dispose of said real estate, at any time, upon such terms and conditions, and for such sums as to him, the said party of the first part may seem meet and proper," is not testamentary in character, and the reservation as to the control of the property, "to convey," etc., relates only to the life interest.—*Brady v. Fuller*, 78 Kan. 448, 96 Pac. 854, 856. An instrument testamentary in character and executed in the form required for a will, can not be denied probate upon the ground that some of its provisions are invalid or contrary to the provisions of law. The probate of the instrument merely determines the validity of its execution. The sufficiency or invalidity of its provisions are to be determined when effect is sought to be given them. The statute makes no provision by which a portion of such an instrument can be admitted to probate and probate denied as to the remainder.—*Estate of Cobb*, 49 Cal. 599, 604; *Estate of Murphy*, 104 Cal. 554, 566, 38 Pac. 543; *Tolland v. Tolland*, 123 Cal. 140, 144, 55 Pac. 681; *Estate of Pforr*, 144 Cal. 121, 125, 77 Pac. 825. An instrument in the form of a deed, by the terms of which a present interest was conveyed to the children of the person executing the same, but, by which, their enjoyment of the estate was postponed until after her death, will be given effect as a deed and not as a will, for if it be not a deed, it fails of any purpose, where it is not so witnessed as to be valid as a will.—*Love v. Blauw*, 61 Kan. 496, 78 Am. St. Rep. 334, 59 Pac. 1059, 1061. Where there is no fraud or collusion, deeds, not testamentary in character, are valid only as such.—*Phillips v. Phillips*, 30 Colo. 515, 71 Pac. 363, 365. A deed of trust may be testamentary in character.—*Cross v. Benson*, 68 Kan. 495, 64 L. R. A. 560, 75 Pac. 558, 562. A deed of trust that conveys no present interest

in the property of the trustors and that seeks to postpone not merely the date of the taking effect of the trust, but also the passing of the interest of the so-called trustors to a time subsequent to the death of one of them, is clearly testamentary in character and is of no effect for the erection of a trust.—*Niccolls v. Niccolls*, 168 Cal. 444, 143 Pac. 712. An absolute assignment of a note secured by mortgage, if such assignment is delivered, conveys a present interest and is not testamentary in character; a provision in such assignment, that it shall not be recorded until the grantor's death, does not affect its character.—*Burkett v. Doty*, 32 Cal. App. 337, 162 Pac. 1042. If a deed is executed by a property owner, with the intention that it shall be a testamentary disposition, but is delivered to his agent who is to give it to the grantee on the grantor's death, the grantor shows, by subsequently seeking the agent and having the deed restored to him, that he never surrendered dominion and control; hence, there was no testamentary disposition.—*Rhines v. Young*, 97 Wash. 437, 166 Pac. 642. A person who, on April 12, 1905, made a deed to another and placed it in hands of a third for delivery to the grantee on the death of the grantor, and who died on April 18, 1913 (whereupon delivery was made as intended), enjoyed a life estate in the property from the time of the execution of the deed, and the property vested in the grantee, on April 12, 1905, subject to this life estate; unless it can be shown that the grantor intended that until his death no title was to vest in the grantee, in which case the deed was inoperative as constituting an attempt to make a testamentary disposition otherwise than by the will.—*Hunt v. Wicht*, 174 Cal. 205, L. R. A. 1917C, 961, 162 Pac. 639. Where a grantor in passing a deed intends not to divest himself immediately of the title, but only to make an arrangement whereby the divestiture shall take place on his death, at which time title shall go to the grantee, the effect is an attempted testamentary disposition and the transaction is a nullity.—*Rice v. Carey*, 170 Cal. 748, 151 Pac. 135. An instrument expressly conveying a life estate in case the grantor survives the grantee and reserving, in such case a remainder to the grantor, but conveying also the remainder to the grantee in case of the latter being the survivor, has no testamentary character, but, considered as a whole, effects a grant in fee.—*Trautman v. Kranz* (Colo.), 165 Pac. 764.

REFERENCES.

Deed, construction of instrument in form of, to become effective upon death of grantor.—See note 7 Am. & Eng. Ann. Cas. 790. May an instrument, not on its face of a testamentary character, be shown by extrinsic evidence to be such, so as to take effect as a will.—See note 13 L. R. A. (N. S.) 1203, 1204.

9. Contract to make a will.

(1) In general.—It is well established that it is competent for the owner of property to make a contract with another person to bequeath the same to that person at the death of the owner.—*Kelley v. Devin*,

65 Or. 211, 132 Pac. 536, following *Rose v. Olliver*, 32 Or. 447, 52 Pac. 176, and *Richardson v. Orth*, 40 Or. 252, 66 Pac. 925, 69 Pac. 455. Where a son conveyed certain real property to his mother upon an oral agreement that she should reconvey the same to him at her decease, this agreement is the same as though she agreed to make a will in his favor covering this property.—*Keefe v. Keefe*, 19 Cal. App. 310, 125 Pac. 929. Plaintiffs who claimed to be equitable owners of an estate, alleged and undertook to show that their uncle entered into an agreement with his wife that he would execute a will giving all his property to her on condition that she would in turn leave the property to plaintiffs; that he had made the will in compliance with this agreement and had fastened a trust upon the property in favor of plaintiffs but that the wife had failed to carry out the agreement on her part and had died without making a will. To sustain their contention it was necessary for plaintiffs to show by clear and convincing proof that the agreement was made and a trust created in their favor. The trial court found against their contention, which finding was confirmed on appeal.—*Overly v. Angel*, 84 Kan. 259, 113 Pac. 1041. The words "to stay with and care for" used to express the consideration of a contract to make a will, have no fixed legal signification. In the light of the situation and circumstances of the contracting parties in this case, they may well indicate personal association, care, and attention, not including the furnishing of groceries, other necessities, and medical attention, and the parties themselves having so interpreted the contract, that will be accepted as the true meaning.—*Bless v. Blizzard*, 86 Kan. 230, 120 Pac. 357. Notwithstanding an agreement by a wife founded upon a valuable consideration, to leave to her husband by will the property owned by her at the time of her death, such property will be subject to sale by the executor, where that is necessary for the payment of valid demands against the estate or of the costs of administration.—*Nelson v. Schoonover*, 89 Kan. 388, 779, 131 Pac. 147. If the promisee commences an action to set aside a conveyance, but dies before the case comes to trial, the action may be continued by his administrator, who is also his heir, in both his representative and individual capacity.—*Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 728. The promisee is not required, as a condition precedent to suing to set aside the conveyance, to present his claim against the estate of the deceased promisor.—*Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 728. Where the promisor conveyed all his real property in his lifetime and at his death left an estate consisting solely of money, the decree of distribution in the matter of his estate is not conclusive upon the right of the promisee under the agreement of the promisor to make him heir.—*Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 728.

(2) *Implication from agreement.*—If the owner of land, being desirous of having some one to take care of him and of his home, agrees to devise the land to a person designated, and such person and his family agree to board and lodge such owner, the condition that he is to have

a home and board during his lifetime with such family necessarily implies that the home shall be fairly decent and comfortable; that the food purchased shall be suitable to his age, health, and condition; and that he shall be respectfully and kindly treated.—*Hodgson v. Martin*, 90 Or. 105, 166 Pac. 929, 175 Pac. 671. The language of an agreement, to make a will in favor of the plaintiff, whereby the sole surviving parent of the plaintiff surrendered the plaintiff, when a child, to the grantor, and ancestor of the defendants, upon the understanding that he and his wife would receive the plaintiff into their family and raise him as their child, and that "he should heir and share equally" with their own daughter, implies an undertaking on the part of the promisor and his wife that on their deaths they will divide their property equally between the plaintiff and their natural child, no other child having been born to them.—*Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 728.

(3) Is not shown, when.—Where people promised and agreed that "they would take said plaintiffs to their home and would take good care of them, and would rear and educate them in a suitable and proper manner, and that they would treat them in all respects as their own children," this does not show any promise or agreement on the part of such people to the effect that they would bequeath or devise to them any of the their property. There is no legal obligation resting on any parent to will any property to a child, if he does not feel so disposed; and, if he does not, the child has no cause of action.—*Baumann v. Kusian*, 164 Cal. 582, 44 L. R. A. (N. S.) 756, 129 Pac. 986. The result of the words, "I will give you fifty acres of land if you will work for me until the farm is paid for," if followed by acceptance and performance of the work, is merely a contract; the use of the "give" does not indicate the purpose to make a will.—*Hayes v. Hayes*, 89 Or. 630, 174 Pac. 579.

REFERENCES.

Contracts to make wills.—See note 102 Am. St. Rep. 240. Agreements to make particular disposition of property by will, discussing the validity of such agreements and the mode of their enforcement.—66 Am. Dec. 784, 14 L. R. A. 861. Gift as a fraud on contract to will property.—See note 20 L. R. A. (N. S.) 1154.

(4) Oral contracts.—An oral contract to make a will, in consideration of the support of the promisor for the remainder of his life, is enforceable in equity; but the agreement must be definite and certain, and the relief not harsh, oppressive, or unjust to innocent third persons, nor against public policy.—*Pugh v. Bell*, 81 Cal. App. 530, 132 Pac. 286. An oral contract to make a testamentary disposition of property may be specifically enforced in favor of the promisee, if clear, certain, and definite in its terms, and its enforcement not harsh, oppressive, and unjust as to innocent third parties.—*Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 732; *Parsons v. Cashman*, 23 Cal. App. 298, 137 Pac. 1111. An oral agreement between husband and wife that she will make a will leaving to him all the property owned by her at the time of her

death, both real and personal, in consideration of real estate owned by him being conveyed to her, is rendered enforceable, notwithstanding the statute of frauds, where, in accordance with its provisions, the title to land paid for by the husband is taken in the wife's name, and she makes such a will and thereafter, in reliance thereon, he expends labor and money in improving the property.—*Nelson v. Schoonover*, 89 Kan. 388, 779, 131 Pac. 147. An oral agreement to make a will in favor of a child received into the family and who has faithfully performed his part of the contract, which must be clear, certain, and definite in its terms, and if specific performance would not be harsh and oppressive, and unjust to innocent third parties, will be enforced. Prior to his death testator retaining a life estate for himself, conveyed all his real estate to a trustee for his only other child and a grand-daughter. He left a will leaving his property in accordance with the said oral agreement. In an action brought for specific performance of the oral agreement it was held that the real estate so conveyed must be held chargeable with a trust in favor of the plaintiff who was the personal representative of the child in question who had died after instituting the action.—*Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 732.

REFERENCES.

Devise of land, validity of oral agreement to make.—See note 5 Am. & Eng. Ann. Cas. 495. Specific performance of contract to execute a will.—See subd. (7), *infra*.

(5) *Mutual abandonment of contract*.—In this action to determine the ownership of certain property, it is held that the evidence sustained the finding that a contract whereby an intestate agreed to will his property to the plaintiffs in consideration of their supporting him for the remainder of his life had been mutually abandoned.—*Pugh v. Bell*, 21 Cal. App. 530, 132 Pac. 286.

(6) *Special contract*.—A special contract, under the Washington Code, which code provides that the husband and wife may jointly enter into any agreement concerning the status of the whole, or any portion, of the community property then owned by them or afterward to be acquired, to take effect upon the death of either, is not a will, and is not governed by the laws relating to the construction of wills.—*McKnight v. McDonald*, 34 Wash. 98, 74 Pac. 1060, 1061.

(7) *Specific performance, when*.—Where testatrix in pursuance of a contract with her husband, executes a will leaving to him all her property, with a proviso that at such time as he could without inconvenience, he should pay a stated amount to her son, a subsequent will, undertaking to give half her property to a trustee for the benefit of her son, may be enforced to the extent of requiring the payment of the stated amount to the trustee.—*Nelson v. Schoonover*, 89 Kan. 388, 779, 131 Pac. 147. In this action to enforce an alleged contract in the nature of an agreement to make a will in favor of the plaintiff, the

evidence supports a finding of such contract, resting in parol and made in 1851, whereby the sole surviving parent of the plaintiff surrendered the plaintiff, when a child, to the grantor, and ancestor of the defendants, upon the understanding that he and his wife would receive the plaintiff into their family and raise him as their child, and that "he should heir and share equally" with their own daughter.—*Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 728. Upon the death of the promisor such oral contract may be specifically enforced in favor of the promisee, who has performed his part thereof; the recent amendments to sections 1624 of the Civil Code and 1973 of the Code of Civil Procedure of California, adopted long after the contract was fully executed on the part of the promisee and whatever rights he had thereunder were vested, having no application.—*Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 728. Such a contract will be enforced not by ordering a will to be made, but by regarding the property in the hands of the heirs, devisees, assignees, or representatives of the deceased promisor, as impressed with a trust in favor of the plaintiff, and by compelling the defendants, who must of course belong to some one of these classes of persons, to make such a disposition of the property as will carry out the intent of the agreement. And where the promisor had, in violation of his agreement, conveyed his property to his only natural child and his grand-daughter, the decree should direct them to convey to the plaintiff according to their respective rights, that is, both must share equally in the loss.—*Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 728. A contract to make a will, in order to be a proper subject for specific performance, must *prima facie* be fair, founded upon an adequate consideration, definite as to the conditions imposed and the obligations assumed, and, if the purported consideration is personal services, the agreement for them must be definite and certain not only with reference to their nature and character, but also with reference to the time of their continuance.—*Parsons v. Cashman*, 23 Cal. App. 298, 137 Pac. 1109. Specific performance of a contract to leave property to a child by will, in consideration of his living with the promisor, will be specifically enforced in case of the child's fulfillment of the contract and the promisor's death without having made the will as agreed.—*Oles v. Wilson*, 57 Colo. 246, 141 Pac. 496. An oral agreement by a sister to remove from her parents' home and live with her brother as his housekeeper and to care for him, upon his promise that she shall have his property at his death, when faithfully kept by her, affords solid grounds for the exercise of the power of a court of equity by a decree for specific performance.—*Smith v. Cameron*, 92 Kan. 652, 141 Pac. 596. The sufficiency of a purported or claimed consideration for a contract to make a will must be determined from the facts of the transaction as they existed when the contract was made, rather than by subsequent developments.—*Parsons v. Cashman*, 23 Cal. App. 298, 137 Pac. 1109. Where one has rendered services to another under an oral agreement that he is to be compensated by the devise of real

estate, the contract may be enforced irrespective of the question of possession, where the services are of such a character that their value in money can not be satisfactorily determined.—*Schoonover v. Schoonover*, 86 Kan. 487, 121 Pac. 485. A contract to make a will, whereby the will, if made, would devise land worth \$2300 subject to debts to the amount of \$600, is not inequitable and will be specifically enforced, although the promisor lived and enjoyed the consideration for only eighteen months.—*Bless v. Blizzard*, 86 Kan. 230, 120 Pac. 351. Where it is found, in an action to enforce an oral agreement to make a will, that the contract was made, that it was fair and equitable, and that the value of the services performed by the plaintiff thereunder was not capable of being estimated in money, it is unnecessary further to find the changes and sacrifices made by him in reliance upon the contract.—*Pugh v. Bell*, 21 Cal. App. 530, 132 Pac. 286. Where the court found that the owner of a farm, with the consent of his wife, made a written contract with their daughter and her husband by which the latter were to live with them on the farm and care for them as long as they lived in consideration of which all their property at their death was to become the property of the daughter and her husband, who substantially and fairly performed the contract and made lasting and valuable improvements on the land; that after the death of his wife the father sold the farm, deprived the daughter and husband of possession, refused longer to live with them, remarried and executed a will leaving his property to other heirs. It was held in an action for specific performance by the daughter and her husband against the other heirs and executor that a resulting trust was fastened upon the proceeds of the sale of the farm in the hands of the executor, in favor of the plaintiffs.—*Dillon v. Gray*, 87 Kan. 129, 123 Pac. 878. An action against heirs or devisees to acquire title to real property, because the decedent, under whom they claim, had agreed to leave it by will to plaintiff, is in the nature of one for specific performance of a contract to convey land, and in the trial thereof a jury can not be demanded as a matter of right.—*Nelson v. Schoonover*, 89 Kan. 388, 779, 131 Pac. 147. To warrant the specific enforcement of a contract to make a will in favor of a particular person, the contract must be definite and certain and also just and fair.—*Baumann v. Kusian*, 164 Cal. 582, 44 L. R. A. (N. S.) 756, 129 Pac. 986. In such action not only is it competent to show what was said by the parties at or about the time the agreement was entered into, but declarations confirming the agreement or statements as to its import by the promisor and his wife, who agreed to it, made during their lives, are admissible.—*Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 728. Where a promisor conveyed part of his property, in violation of his agreement with the promisee, the latter's right of action respecting the property, would not accrue until the promisor's death, without having made the agreed disposition of his property; if the promisee commences an action to set aside the conveyance, but dies before the case comes to trial, the action may be continued by his administrator,

who is also his heir, in both his representative and individual capacity; but a money judgment, recovered in such action, should run in favor of the plaintiff in his representative capacity as administrator.—*Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 728.

REFERENCES.

Specific performance of contract to make a will.—See note Ann. Cas. 1914A, 399.

(8) *Same*. When not.—An agreement whereby a woman promises to make a will in favor of her nephew in consideration of his becoming an inmate of her home, assuming the obligations of a son, and assisting her in domestic and business affairs, is indefinite in an essential particular if silent as to the length of time for which such services are to be continued.—*Parsons v. Cashman*, 23 Cal. App. 298, 137 Pac. 1109. If it appears that such promise to make a will has not induced the promisee to relinquish anything of present or prospective value or advantage, but has operated to his profit rather than his detriment, and the agreement lacks fairness, specific performance will not be decreed.—*Parsons v. Cashman*, 23 Cal. App. 298, 137 Pac. 1109.

REFERENCES.

Specific performance of oral contract to make a will.—See subd. (4), *supra*.

(9) *Limitation of actions*.—When the promisor conveyed part of his property to his daughter and grand-daughter in violation of his agreement, the promisee's right of action in respect thereto did not accrue until the promisor died without making the agreed disposition of his property, so that an action brought upon the death of the promisor is not barred by the statute of limitations, although the conveyance was made many years before.—*Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 728.

10. *Escrow deed, when not a will*.—A deed executed and delivered in escrow, to take effect upon the performance of certain conditions to be observed by the grantee therein, can have no effect as a testamentary disposition of property, upon the death of the grantor therein named, where there is nothing in the record indicating that it was thus intended.—*De Bow v. Wollenberg*, 52 Or. 404, 96 Pac. 536, 543.

11. *Deed construed in aid of will*.—Where a deed was executed for the purpose of more effectually carrying out the provisions of a will, the instruments will be construed together, where it appears that it was intended that the wife should have a life estate, and that the deed was executed as evidence of her consent to the provisions of the will.—*Jack v. Hooker*, 71 Kan. 652, 81 Pac. 203, 205. When the grantor had, by previous holographic will, devised to the grantee the same property subsequently conveyed to him by deed, which was in fact an accomplishment of his wish previously expressed in his will, and the deed was drawn by the attorney of the grantor, to whom he expressed a

estate, the contract may be enforced irrespective of the question of possession, where the services are of such a character that their value in money can not be satisfactorily determined.—*Schoonover v. Schoonover*, 86 Kan. 487, 121 Pac. 486. A contract to make a will, whereby the will, if made, would devise land worth \$2300 subject to debts to the amount of \$600, is not inequitable and will be specifically enforced, although the promisor lived and enjoyed the consideration for only eighteen months.—*Bless v. Blizzard*, 86 Kan. 230, 120 Pac. 351. Where it is found, in an action to enforce an oral agreement to make a will, that the contract was made, that it was fair and equitable, and that the value of the services performed by the plaintiff thereunder was not capable of being estimated in money, it is unnecessary further to find the changes and sacrifices made by him in reliance upon the contract.—*Pugh v. Bell*, 21 Cal. App. 530, 132 Pac. 286. Where the court found that the owner of a farm, with the consent of his wife, made a written contract with their daughter and her husband by which the latter were to live with them on the farm and care for them as long as they lived in consideration of which all their property at their death was to become the property of the daughter and her husband, who substantially and fairly performed the contract and made lasting and valuable improvements on the land; that after the death of his wife the father sold the farm, deprived the daughter and husband of possession, refused longer to live with them, remarried and executed a will leaving his property to other heirs. It was held in an action for specific performance by the daughter and her husband against the other heirs and executor that a resulting trust was fastened upon the proceeds of the sale of the farm in the hands of the executor, in favor of the plaintiffs.—*Dillon v. Gray*, 87 Kan. 129, 123 Pac. 878. An action against heirs or devisees to acquire title to real property, because the decedent, under whom they claim, had agreed to leave it by will to plaintiff, is in the nature of one for specific performance of a contract to convey land, and in the trial thereof a jury can not be demanded as a matter of right.—*Nelson v. Schoonover*, 89 Kan. 388, 779, 131 Pac. 147. To warrant the specific enforcement of a contract to make a will in favor of a particular person, the contract must be definite and certain and also just and fair.—*Baumann v. Kusian*, 164 Cal. 582, 44 L. R. A. (N. S.) 756, 129 Pac. 986. In such action not only is it competent to show what was said by the parties at or about the time the agreement was entered into, but declarations confirming the agreement or statements as to its import by the promisor and his wife, who agreed to it, made during their lives, are admissible.—*Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 728. Where a promisor conveyed part of his property, in violation of his agreement with the promisee, the latter's right of action respecting the property, would not accrue until the promisor's death, without having made the agreed disposition of his property; if the promisee commences an action to set aside the conveyance, but dies before the case comes to trial, the action may be continued by his administrator,

who is also his heir, in both his representative and individual capacity; but a money judgment, recovered in such action, should run in favor of the plaintiff in his representative capacity as administrator.—*Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 728.

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(8) *Same. When not.*—An agreement whereby a woman promises to make a will in favor of her nephew in consideration of his becoming an inmate of her home, assuming the obligations of a son, and assisting her in domestic and business affairs, is indefinite in an essential particular if silent as to the length of time for which such services are to be continued.—*Parsons v. Cashman*, 23 Cal. App. 298, 137 Pac. 1109. If it appears that such promise to make a will has not induced the promisee to relinquish anything of present or prospective value or advantage, but has operated to his profit rather than his detriment, and the agreement lacks fairness, specific performance will not be decreed.—*Parsons v. Cashman*, 23 Cal. App. 298, 137 Pac. 1109.

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10. *Escrow deed, when not a will.*—A deed executed and delivered in escrow, to take effect upon the performance of certain conditions to be observed by the grantee therein, can have no effect as a testamentary disposition of property, upon the death of the grantor therein named, where there is nothing in the record indicating that it was thus intended.—*De Bow v. Wollenberg*, 52 Or. 404, 96 Pac. 536, 543.

11. *Deed construed in aid of will.*—Where a deed was executed for the purpose of more effectually carrying out the provisions of a will, the instruments will be construed together, where it appears that it was intended that the wife should have a life estate, and that the deed was executed as evidence of her consent to the provisions of the will.—*Jack v. Hooker*, 71 Kan. 652, 81 Pac. 203, 205. When the grantor had, by previous holographic will, devised to the grantee the same property subsequently conveyed to him by deed, which was in fact an accomplishment of his wish previously expressed in his will, and the deed was drawn by the attorney of the grantor, to whom he expressed a

wish to convey the property to the grantee, and there is nothing to indicate that there was any fraud or undue influence exercised by the grantee, or to show that the grantor, though afflicted with cancer, was not in the full possession of his mental faculties, the delivered deed can not be set aside by the executor of the deceased grantor.—*Boye v. Andrews*, 10 Cal. App. 494, 102 Pac. 551. An offer by letter to make a gift of property after death is merged in a subsequent deed and bill of sale duly recorded so that the donee's rights are under the latter and not under the letter.—*Jackson v. Lamar*, 67 Wash. 385, 121 Pac. 860. Where a testator gives pecuniary and specific legacies of personal property and refers to a deed which he had given to his son of certain specific real estate and then gives all his real and personal property to his wife, such latter gift will be construed as a residuary devise and bequest so that the other legacies may take effect as it was the evident intention of the testator that they should.—*Bacon v. Nichols*, 47 Colo. 31, 105 Pac. 1083.

REFERENCES.

The question of the distinction between a deed and a will is considered in the note to *Moody v. Macomber*, 134 Am. St. Rep. 758. Consideration of deed incorporated in will by reference.—See head-line 7, *supra*.

12. Holographic wills.

(1) *Validity*.—Under the Wyoming statute, it is required that all wills, including holographic wills, be witnessed by two competent witnesses; otherwise, they are not valid. The law does not except holographic wills from this provision, and where the instrument offered for probate is not witnessed, it is invalid.—*Neer v. Courick*, 4 Wyo. 49, 18 L. R. A. 588, 31 Pac. 862, 864. An instrument is valid as a holographic will if it is wholly in the chirography of the testator, has as its opening words, "This is the last will and testament of," followed by the testator's name, and concludes, "I do hereby publish and declare the foregoing entirely written, dated, and signed by my own hand, to be my last will and testament, this second day of January, 1912."—*Estate of McMahon*, 174 Cal. 423, 163 Pac. 669. Section 6316 of the Compiled Laws of 1917, declares what are the requirements of a holographic will, one of these being that the instrument must be wholly in the testator's handwriting; hence, if part of the contents be printed matter the instrument is void.—*In re Wolcott's Estate* (Utah), 180 Pac. 169. An instrument is not good as a holographic will if the testator is not indicated by any signature subscribed to it, but only by one following the pronoun "I" in the opening words.—*Estate of Manchester*, 174 Cal. 417, Ann. Cas. 1918B, 227, 163 Pac. 358. The omission of the month in the date of a holographic will is fatal to the validity of the instrument.—*Estate of Anthony*, 21 Cal. App. 157, 131 Pac. 96. A holographic will in which a portion of the date is printed and not in the handwriting of the testator is invalid even though in strict compliance with the law in all other respects.—*In re*

Noyes' Estate, 40 Mont. 190, 20 Ann. Cas. 366, 26 L. R. A. (N. S.) 1145, 105 Pac. 1018. An instrument asserted to be a holographic will is not valid as such, where it was written on a stationer's will form by filling in the blank spaces.—In re Wolcott's Estate (Utah), 180 Pac. 169. Where a woman wrote out an instrument in the form of a will, but did not sign it, and then deposited it in a trunk, and wrote on the back of an envelope, and signed a statement to the effect that she had made her will and gave specific and accurate directions as to where it was to be found, a valid holographic will was not effected.—Estate of Tyrrell, Knauff v. Davidson, 17 Ariz. 418, 426, 153 Pac. 767.

REFERENCES.

Holographic wills.—See notes Kerr's Cal. Cyc. Civ. Code, § 1277; 6 L. R. A. 775, 52 Am. Dec. 591-593, 104 Am. St. Rep. 22-34. Holographic will, rule requiring to be found "among valuable papers."—See note 5 Am. & Eng. Ann. Cas. 636. Codicil to holographic will.—See note Kerr's Cal. Cyc. Civ. Code, § 1277. Construction of holographic wills.—See note on the construction and interpretation of wills, following the table after § 935, post.

(2) Formalities in executing.—Where a will is holographic, and written upon two separate sheets of paper, the mere fact that the will is found upon separate sheets is immaterial, and where the apparent difference in handwriting on separate sheets is explained only by conjecture or speculation, the finding of the court, to the effect that the will was "one continuous instrument and a single document," should not be set aside.—Estate of Traylor, 126 Cal. 97, 58 Pac. 454, 455. The date in a holographic will is not a material thing, although made necessary by the statute. It is a means of identification, and aids in determining the authenticity of the will; but the main and essential thing is, that the will be wholly written and signed by the hand of the testator. An erroneous date in such a will does not invalidate it, and an order refusing to admit the will to probate for this reason alone, is erroneous.—Estate of Fay, 145 Cal. 82, 104 Am. St. Rep. 17, 78 Pac. 340, 341. Where a holographic will gives a date in connection with memoranda as to the ownership of certain items of property, such date will be regarded as the date of the will, and is a sufficient compliance with the statute. It is immaterial that the memoranda as to the property shows cancellation, where the date itself was not canceled.—Estate of Clisby, 145 Cal. 407, 104 Am. St. Rep. 58, 78 Pac. 964. A mistake or error in the date of a holographic will does not invalidate the will, and it will be presumed that the date given is the true date.—Estate of Fay, 145 Cal. 82, 83, 104 Am. St. Rep. 17, 78 Pac. 340, 341. Under the California statute a holographic will is not required to be "subscribed by the testator at the end thereof." It is sufficient that it be "signed" by him, and this signing may be at the beginning, or any other part of the document.—Stratton's Estate v. Morgan, 112 Cal. 513, 44 Pac. 1028, 1029. A holographic codicil to a

will theretofore made, and which will was not entirely in the handwriting of the testator, adopts the will by reference, and the latter, in contemplation of law, becomes a part of the document making the reference.—Estate of Soher, 78 Cal. 477, 21 Pac. 8, 9. There is no requirement that a holographic will be published by signing and acknowledgment, and the attestation of witnesses.—Estate of Tyrrell, Knauff v. Davidson, 17 Ariz. 418, 426, 153 Pac. 767. The statutory requirement that a holographic will must be dated by the testator is one, the neglect of substantial compliance with which is not to be excused by the code rule of liberal construction.—Estate of Carpenter, 172 Cal. 268, L. R. A. 1916E, 498, 156 Pac. 464. Holographs are usually required to be wholly written, dated, and signed by testator himself. "4-14-07" held sufficient within section 1277 of the Civil Code of California, requiring holographs to be dated.—In re Chevallier's Estate, 159 Cal. 161, 113 Pac. 130. The omission of the month in the date of a holographic will is fatal to the validity of the instrument.—Estate of Anthony, 21 Cal. App. 157, 131 Pac. 96. Under section 1276 of the Civil Code of California, requiring a holographic will to be "subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto," a showing that another person, in the testator's presence and at his direction, signed the testator's name to the will meets all the requirements of the statute.—In Matter of Dombrowski's Estate, 163 Cal. 290, 125 Pac. 233. The date of a holographic will may be abbreviated and may be expressed in numerals. A date written "4-14-07" is sufficient, and will be construed as meaning April fourteenth, nineteen hundred and seven.—Estate of Chevallier, 159 Cal. 161, 113 Pac. 130. "Date" means day, month, and year.—In re Price's Estate, 14 Cal. App. 462, 112 Pac. 482. Purported date, "Dated this — day of —, 1906," held insufficient within that section, defining holographic wills as those "entirely written, dated, and signed by hand of testator himself."—In re Price's Estate, 14 Cal. App. 462, 112 Pac. 482. Inasmuch as a holographic will must be written, signed, and dated, all in the hand of the testator, a failure in respect of any one of these essentials invalidates the instrument; such a failure appears where the date is left incomplete, because it lacks a statement of either the day, the month, or the year of execution.—Estate of Vance, 174 Cal. 122, 125, 162 Pac. 103. The signature, in the case of a holographic will, must, under the laws of California, be subscribed to the body of the writing, unless if written only in the body of the will there is something on the face of the instrument to show that the signature was intended to be an executing signature.—In re Hurley's Estate, 178 Cal. 713, 174 Pac. 669. Absolute precision of execution is not expected in the execution of a holographic will. What is required, is a clear showing on the face of the instrument of its execution in conformity with the law.—Estate of McMahon, 174 Cal. 423, 163 Pac. 669.

REFERENCES.

Violation of requirement that holographic will shall be written by testator.—See note 26 L. R. A. (N. S.) 1145. Sufficiency of showing that paper offered as a holographic will was intended as such.—See note 33 L. R. A. (N. S.) 1018. Holographic will not wholly in handwriting of testator.—See note 1 Am. & Eng. Ann. Cas. 373.

(3) Holographic will by married woman.—Under the Idaho statute, the will of a married woman "must be attested, witnessed, and proved in like manner as all other wills." But this does not extend the power to married women to make a holographic will.—*Scott v. Hartness*, 6 Ida. 736, 59 Pac. 556, 557.

REFERENCES.

Holographic wills.—See note 104 Am. St. Rep. 22.

13. Nuncupative wills.—Under the statute requiring that a nuncupative will must be made, at the time of the last sickness of the testator, the words, "at the time of the last sickness," must be taken in their ordinary signification. The statute requires it to be proved that the will was made "in the last sickness," and it is a reasonable and necessary implication that it must also appear that the testator, at the time of making the will, supposed that such sickness would prove his last sickness; in other words, that he should be impressed with the probability that he would never recover.—In *re Miller's Estate*, 47 Wash. 253, 91 Pac. 967, 968; quoting from, and approving, *Harrington v. Stees*, 82 Ill. 50, 25 Am. Rep. 290. Under the Oklahoma statute, to make a nuncupative will valid, the decedent must, at the time, be in actual military service in the field, or doing duty on shipboard at sea. Even a soldier who is not in the field, nor the person doing duty on shipboard not at sea, can not make a nuncupative will.—*Ray v. Wiley*, 11 Okla. 720, 69 Pac. 809, 810. Nuncupative wills are not valid in the state of Wyoming.—In *re Thornton's Estate*, 21 Wyo. 421, 132 Pac. 135. A nuncupative will must be made in the presence of two witnesses at least.—In *re Brown's Estate*, 101 Wash. 314, 172 Pac. 247. Testimony in support of nuncupative will will not, under the laws of the state of Washington, be received unless it be offered to a court of probate within six months after the testamentary words were spoken.—In *re Greenleaf's Estate*, 69 Wash. 478, 125 Pac. 790. The term "last sickness," as contemplated by the law controlling the making of nuncupative wills, has no application to a case where the sick person, after making the oral will disposing of property, arises from bed, discharges his nurse, walks about, and lives for fifteen days.—*Brown v. State*, 87 Wash. 44, Ann. Cas. 1917D, 604, 151 Pac. 81.

REFERENCES.

Mutual or conjoint wills.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1279. Nuncupative will, how executed.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1288. Nuncupative will.—See notes 8 L. R. A. 40, 9 L. R. A. 829. Nuncupative will, statutory restrictions as to time of making.—See

note 3 Am. & Eng. Ann. Cas. 317. What is "last sickness," permitting a nuncupative will.—See note 13 L. R. A. (N. S.) 1092-1094. Requisites of valid nuncupative wills.—See note Kerr's Cal. Cyc. Civ. Code, § 1289.

14. Joint, mutual, or reciprocal wills.—Where a husband and wife arranged for the disposition of their property after their death, one by will and the other by deed, and both deed and will were placed in a bank where they remained until the death of the husband, when the will was removed, it was held that the deed, given under such circumstances, was testamentary in character, and that the grantor therein did not intend to make a delivery, except such as was subject to recall.—*Sappingfield v. King*, 49 Or. 102, 89 Pac. 142, 143. The most that can be said of such instruments is that they are mutual and reciprocal, and that each stands as an independent will unaffected by the other.—*Sappingfield v. King*, 49 Or. 102, 90 Pac. 150. A provision in a mutual will that in the event of the death of either of the testators, if the survivor shall continue living for thirty days thereafter the whole estate of the deceased testator should go to the survivor, is not invalid as suspending the vesting of the estate for that period.—*Estate of Cross*, 163 Cal. 778, 127 Pac. 70. An oral agreement to execute mutual wills is within the statute of frauds and where one party subsequently makes another will the other party can not have specific performance of the original oral agreement.—*McClanahan v. McClanahan*, 77 Wash. 138, Ann. Cas. 1915A, 461, 137 Pac. 479. An agreement to make mutual wills on the basis that the survivor should leave his or her property to a particular person is valid if performed by the making of the wills and the acceptance by the surviving party of the fruits of the agreement, but it is valid only as a contract, the performance of which by one party and acceptance by the other has taken it out of the operation of the statute of frauds. It is no objection to the probate of a will that it violates such an agreement, or revokes a former will made in pursuance of it. While such former will is revoked as a will it still stands as evidence of the contract.—*In re Burke's Estate*, 66 Or. 252, 134 Pac. 13. A contract in order to render mutual wills irrevocable must be in writing and is of no force unless evidenced in writing or partially performed so as to relieve it from the operation of the statute of frauds. The mere making of a will in pursuance of a contract required by the statute of frauds to be evidenced in writing is not such a part performance of the contract as to render it enforceable.—*In re Edwall's Estate*, 75 Wash. 391, 134 Pac. 1043, 1046. An instrument executed by husband and wife owning community property and having no issue, whereby each gave to the other all his or her interest in the property effective on his or her death with remainder over after the death of the survivor to the heirs at law of both, is a joint and mutual will.—*In re Anderson's Estate*, 14 Ariz. 502, 131 Pac. 975. Joint or mutual wills, made upon proper understanding and executed pursuant to a contract or policy designed to settle the probate interests of the testators and looking to the just provision

of those having a claim upon their bounty, partake of the nature of a contract and may be specifically enforced.—*Prince v. Prince*, 64 Wash. 552, 696, 117 Pac. 257. That a husband who was in good health agreed to make a will devising all his property to his wife who was in a condition of health which it was believed would soon result in death, in consideration of her making the same sort of a will in his favor rather tends to show a disposition to overreach her than to enter into an agreement for her benefit or even for their mutual benefit.—*Betcher v. Brady*, 52 Wash. 644, 101 Pac. 222. A joint and mutual will, executed by husband and wife, by which, after the death of either, a survivorship of thirty days is made a condition precedent to the vesting of the estate, will not be construed as failing to vest title during the thirty days, since the rules and laws of inheritance and succession interposed wherever the will was silent, with the result that title vested in the heirs, devisees, or legatees, subject to divestiture if either spouse should survive the other for more than thirty days.—*Estate of Cross*, 163 Cal. 778, 127 Pac. 70. Clauses of mutual wills showing an absolute devise of all property from the testator and testatrix to the survivor of them.—*Stevens v. Myers*, 91 Or. 114, 177 Pac. 37. Sufficient evidence of a valid consideration for the execution of mutual wills.—*Stevens v. Myers*, 91 Or. 114, 177 Pac. 37. Sufficient evidence of agreement to execute mutual wills.—*Stevens v. Myers*, 91 Or. 114, 177 Pac. 37. If a husband and wife make a joint will disposing of the community property to the survivor, which, upon his or her death, would be distributed to the several heirs of both, the revocation of the will by the survivor revokes the entire will; such a will should not be treated simply as the individual, personal will of each of the persons who signed it.—*Estate of Anderson*, 18 Ariz. 266, 270, 158 Pac. 457. Instance of a joint will by husband and wife whereby the survivor is to take all that the one first dying shall leave, with full power of disposition in such survivor, and their children to take equally in default of an exercise of the power.—*Postlethwaite v. Edson*, 98 Kan. 444, 155 Pac. 802. A mutual and reciprocal joint will, executed by husband and wife, making provision for themselves during the lifetime of both and of the survivor, and giving the property to their children thereafter, is not contrary to public policy.—*Lewis v. Lewis*, 104 Kan. 269, 178 Pac. 421.

REFERENCES.

Validity and probate of joint and mutual wills.—*Ann. Cas.* 1915A, 364. Mutual or reciprocal wills generally.—See note to *Robertson v. Robertson*, 136 Am. St. Rep. 592-605. Revocability of mutual will.—See note 27 L. R. A. (N. S.) 508. Joint, mutual, reciprocal, or multi-wills.—See note 136 Am. St. Rep. 592.

15. *Foreign wills*.—Where a testator executes two separate and distinct wills, one relating solely to property at his domicile and the other relating solely to property situated in a foreign state or county, both are valid if executed, attested, and proved in accordance with the Probate Law—133

laws of the place where the property disposed of is situated.—*Thompson v. Parnell*, 81 Kan. 119, 33 L. R. A. (N. S.) 658, 105 Pac. 502.

16. Non-intervention wills

(1) *In general.*—Under the Washington statute, provision is made for the execution of a non-intervention will, the purpose of which is to authorize one while living, and when competent, to provide for the management, disposition, and distribution of his property after death without administration in the probate court. As to such wills the procedure controlling the administration in probate is not applicable.—*State v. Superior Court*, 21 Wash. 575, 59 Pac. 483, 484. Where, under a non-intervention will, the property of the estate vested in the devisees mentioned in the will, and they had conveyed title thereto for a valuable consideration, and the trust relative to the property was concluded, subsequent proceedings in the probate courts were without authority and void.—*English-McCaffery Logging Co. v. Clowe*, 29 Wash. 721, 70 Pac. 138. The statute of Washington providing for non-intervention wills must be given full force and effect in all cases coming clearly within its terms. Under that statute, estates may be withdrawn from the jurisdiction and control of the county court, and the acts of the executors under the will, so long as they faithfully comply with its provisions, can not be called in question.—*Newport v. Newport*, 5 Wash. 114, 31 Pac. 428, 430. In order that the probate court may assume jurisdiction of an estate disposed of by a non-intervention will, the petition must show plainly that the executor has failed to execute faithfully his trust, or to take care of the property, or that damage will result from his action or failure of action.—*Bishop v. Locke*, 92 Wash. 90, 158 Pac. 997.

(2) *Force of the statute.*—In the statute providing for non-intervention wills, there is nothing to prevent the executor named in such a will from executing his trust without interference by the court; on the other hand, there is nothing to prevent his invoking the court's jurisdiction, whether of equity or probate, if he deems it expedient to do so.—*Bayer v. Bayer*, 83 Wash. 430, 145 Pac. 433. The statute relating to non-intervention wills contemplates that an executor of that kind of a will has, especially if the will does not direct otherwise, the same time as have ordinary executors and administrators within which to administer the estate.—*Bishop v. Locke*, 92 Wash. 90, 158 Pac. 997; *Schubach v. Redelsheimer*, 92 Wash. 124, 158 Pac. 739.

(3) *Object of statute and policy of court.*—The object of the non-intervention will statute is to allow estates to be settled with the least possible court interference and to reduce the costs to a minimum; a liberal construction is to be given the statute in furtherance of this object.—*Schubach v. Redelsheimer*, 92 Wash. 124, 158 Pac. 739. It is the policy of the court to put a most liberal construction on laws relating to the administration of estates without the intervention of

the court to the end that the object intended (that is, the saving of costs and the burdening and clouding of titles with court proceedings) could be avoided by those who have property subject to testamentary disposition. The object of the law being to give a testator the right to provide for the settlement of his own estate, no construction should be put upon it that will defeat this laudable purpose. An executor under a non-intervention will is a trustee deriving his power from the will and not subject to the control of the court.—*Fulmer v. Gable*, 73 Wash. 684, 132 Pac. 641. An intention of a testator to dispense with administration must be evidenced by express words in the will or by necessary implication.—*Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 256.

(4) **Adjudication of solvency.**—The only purpose of the adjudication of solvency in the case of non-intervention wills is to determine whether the estate shall be administered according to the provisions of the will or according to the provisions of the statute. The executor is the representative of the estate before the adjudication of solvency as well as afterwards and notice to creditors must be published whether the estate be solvent or insolvent.—*Strand v. Stewart*, 51 Wash. 685, 99 Pac. 1029.

(5) **Jurisdiction of court.**—After a non-intervention will has been proven, the estate adjudged solvent and the executors named in the will have accepted the trust, the estate is removed from the jurisdiction of the probate court, except as is otherwise provided in the statute in reference to non-intervention wills, and a court of equity is thereafter the proper forum for the determination of issues arising in relation thereto.—*Clarke v. Baker*, 76 Wash. 110, 135 Pac. 1028. In the case of a non-intervention will the court sitting in probate has no jurisdiction to make orders with reference thereto.—*In re Guye's Estate*, 63 Wash. 167, 132 Am. St. Rep. 1111, 114 Pac. 1042. Under the statutes of Washington relating to non-intervention wills if the trustee is delinquent the court will issue letters of administration and proceed to a settlement of the estate in the manner provided by law.—*Fulmer v. Gable*, 73 Wash. 684, 132 Pac. 642. The fact that one of two executors of a non-intervention will is a creditor of the estate is not covered by any of the statutory conditions under which the probate court assumes jurisdiction in the settlement of an estate disposed of by a will of that sort.—*Schubach v. Redelsheimer*, 92 Wash. 124, 158 Pac. 739. In settling a non-intervention will, after the initiatory steps have been taken, the court loses jurisdiction; and this rule is not modified by the statute whereby executors, when creditors of the estate, are required to present their claims to the court.—*Schubach v. Redelsheimer*, 92 Wash. 124, 138 Pac. 739.

17. **Instruments construed not to be wills.**—A written instrument as follows: "San Francisco, February 4th, 1901. For services rendered, I, the undersigned, leave to Mrs. McCloskey the balance of my account with the German Savings & Loan Society, which amounts to date

\$789.85 (seven hundred eighty-nine dollars and eighty-five cents). Nicholas Murphy,"—executed by the assignor in view of his impending death, and accompanied by the delivery of the bank-book showing the account, is construed as a present assignment of the claim and not as a testamentary disposition of the fund in bank.—*McCloskey v. Tierney*, 141 Cal. 101, 99 Am. St. Rep. 33, 74 Pac. 699. The question as to whether an instrument is a deed or a will may be tested by the following proposition: Did the maker intend to convey any estate or interest whatever to vest before his death and upon the execution of the paper, or, upon the other hand, did he intend that all the interest or estate should take effect only at his death? If the former, it is a deed; if the latter, it is testamentary and revocable.—*Deckenbach v. Deckenbach*, 65 Or. 160, 130 Pac. 732. A widow owning certain premises formerly her home in another county, entered into an "agreement for maintenance" by which she was to furnish the land for the joint use and occupation of herself and a distant relative, G., she to have the right to use and make her home in the house during her life, he to occupy and cultivate the land, keep it in reasonable repair, pay the taxes, treat her kindly, and provide for and maintain her in health and sickness in a comfortable manner, and in lieu of clothing to pay her \$100 the first of each January. She covenanted that upon her death the agreement should stand for, convey and vest in G., the fee simple title as if a good warranty deed upon sufficient consideration had theretofore been made. She retained the option to terminate the contract upon the failure of G. to carry out his part thereof, in which case he was to give her possession. Before the land could be occupied the widow died. G. had assisted for a few weeks in her care and he brought her remains for burial in the neighborhood of the land, paying the medical and funeral expenses. Held, that while he might recover from her estate for his services and expenses, neither he nor his grantee was entitled to the land.—*Glover v. Fillmore*, 88 Kan. 545, 129 Pac. 144. Writing attached to will, testamentary in character but not executed with formalities required for wills, held inadmissible in evidence in favor of devisee in proceedings on petition for distribution.—*In re Benner's Estate*, 155 Cal. 153, 99 Pac. 715. An instrument is testamentary in nature only when it appears from its terms that the intention of the maker is that it should not be operative to dispose of the property, or of any interest therein, present or future, until his death. If the instrument, according to its legal effect, passes at the time of its execution a present interest or title in the property, although it may be only an interest in a future estate and may be subject to defeat on the happening or non-occurrence of a future event, it is a present conveyance and not a will.—*Tennant v. John Tennant M. Home*, 167 Cal. 570, 140 Pac. 242. An order on a bank to pay a specified sum to the payee, "if countersigned across the back" by the drawer and presented in his lifetime, and if presented after his death then to pay without being countersigned, is not open to the

objection that such check or order was an ineffectual attempt at a testamentary disposition. On its face, the instrument can not be so regarded. It is a valid and binding obligation on which the plaintiff may recover.—*Nassano v. Tuolumne County Bank*, 20 Cal. App. 603, 130 Pac. 29. The provisions of sections 4766, 4772, Revised Codes of Montana, are rules of interpretation merely, and have nothing to do with the prerequisite steps which must be shown to have been taken in executing a paper before it may be regarded as of a testamentary character. Unless these appear to have been taken by the testator the paper never assumes such a character and is a mere nullity.—*In re Noyes' Estate*, 40 Mont. 231, 106 Pac. 357. A writing that on its face is a mere agreement between husband and wife for the wife's support, and annexed to an earlier writing of like character signed by the two, is not a will; and this is so regardless of whether it is sufficiently signed or not signed at all.—*Estate of Lowe, Lowe v. Lowe*, 178 Cal. 111, 172 Pac. 583. A letter containing no words of bequest and not signed by witnesses is not a will.—*Tuckerman v. Berry* (Colo.), 164 Pac. 721. A letter inclosed in an envelope containing the writer's will, but "bearing overwhelming evidence that it was not written by the deceased *animo testandi*, but, to the contrary, that it was written as a letter of private information and advise to the man whom he had named as executor in his formal will," is not to be taken as part of the will itself.—*In re Keith's Estate*, 173 Cal. 276, 159 Pac. 705.

REFERENCES.

Sufficiency of letters as will.—See note 17 L. R. A. (N. S.) 1126-1129. What is testamentary capacity.—See note 27 L. R. A. (N. S.) 1.

18. Will as evidence.—A naked unprobated will is not admissible in evidence as a muniment of title in ejectment.—*Jones v. Doe*, 6 Or. 188, 191. An unprobated will can not be received in evidence to prove title to real estate in a person to whom the real estate is devised by the terms of such will.—*Roberts v. Roberts*, 168 Cal. 307, Ann. Cas. 1916A, 886, 142 Pac. 1080. The record of an unprobated will is not admissible in evidence.—*In re Frandsen's Will*, 50 Utah 156, 167 Pac. 362. Where a woman testifies that property, conveyed by her as separate property, was really community in character, a will made by her may be offered in cross-examination to impeach her testimony, if the will is opposed to this view.—*Thompson v. Davis*, 172 Cal. 491, 157 Pac. 595. A declaration in a man's will is not admissible to prove that his widow is not entitled to a deposit represented by the pass book of a savings bank containing a statement to the effect that the deposit is a joint one payable to both or either, or to the survivor of them, and where this condition was recognized by the man up to the time of his death.—*Crowley v. Savings Union B. & T. Co.*, 30 Cal. App. 144, 157 Pac. 516.

REFERENCES.

Will as evidence of adoption.—See note on the law of adoption, following § 14, ante.

II. REVOCATION OF WILLS.

(1) *In general.*—A will that has been executed as required by law can be revoked only in the manner pointed out in the statute; the mere interlineation by the testator of a line in the body of the will, made after its execution, which neither adds to nor takes from the meaning of the will, and which in no wise indicates an intention to revoke the will, does not operate as a revocation thereof.—*In re Ballard's Estate*, 56 Okla. 149, 155 Pac. 894. Instruments falling within the provisions of the statute relating to the revocation of wills include such instruments only as have for their sole purpose the complete destruction or obliteration of a will. § 7072 R. S. 1908.—*Freeman v. Hart*, 61 Colo. 455, 158 Pac. 305. A deed testamentary in character may be revoked by the testamentary grantor at any time.—*Simmons v. McComber*, 60 Wash. 469, 111 Pac. 581. In order to constitute the revocation of a will, the mere intent unperformed is not sufficient; there must be a joint union of act and intent.—*Estate of Silva*, 169 Cal. 116, 121, 145 Pac. 1015. Interested persons, authorized to contest a will or to seek revocation of its probate, are those only who but for the will might take as heirs of the decedent.—*In re Pepin's Estate*, *Pepin v. Meyer*, 53 Mont. 240, 250, 163 Pac. 104, 107. The statute relating to wills, when providing for express revocation, adds that nothing therein contained "shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator"; but this does not empower a court to conceive that had the change taken place during the testator's life he would have made some other disposition of his property, and to adjudge accordingly.—*Vanek v. Vanek* (Kan.), 180 Pac. 240.

(2) *Contractual relation.*—Where a will has been made pursuant to a valid contract, the testator can not by the act of revocation escape the obligations of his contract, nor can his heirs profit by taking advantage of such revocation.—*Torgerson v. Hauge*, 34 N. D. 646, 656, 159 N. W. 6. A woman made, in response to a desire intimated by her brother who was supporting her, a will in his favor, and he thereupon assured her by letter that he would provide for her in case of his death. He died, leaving a will so providing for her. It was held that the woman's will was based on a sufficient consideration and was irrevocable.—*Chase v. Stevens*, 34 Cal. App. 98, 166 Pac. 1035. The acceptance of benefits under a joint will by the survivor of the husband and wife who have executed the instrument debars him or her of the right of revocation.—*Lewis v. Lewis*, 104 Kan. 269, 178 Pac. 421. A will executed under an agreement founded upon a valuable consideration is contractual as well as testamentary. In the latter aspect it may be revoked without the consent of the beneficiary, but not in the former. Its revocation as an instrument capable of probate is effected by the execution of a new will, and this may be enforced so far as the provisions of the earlier will, which are based on contract, are not violated, but no further.—*Nelson v. Schoonover*, 89 Kan. 388, 779, 131 Pac. 147. If a wife has a settled design to convey property to her daughter, but

is dissuaded therefrom by her husband's promise, that, if she will convey to him instead of to her daughter, he will make a will, devising all the mother's property and all of his own real estate to the daughter and to a son in equal shares, the thing contemplated is a will which shall be and remain effective; to make the will and then revoke it is a fraud, giving rise to a trust.—*Huffine v. Lincoln*, 52 Mont. 585, 160 Pac. 820. Where parents solicited a son to come to reside with and to support them, agreeing, in case he did, to leave him their property, and the son, yielding, sold his own property in another county and came to them as solicited and undertook their support, a joint will, made by them in his favor was contractual as well as testamentary, and if a part performance transpired, so that, after the son's living with them thus for fifteen years and then dying, the parents could not then revoke the will and devise the property away from his heirs.—*Torgerson v. Hauge*, 34 N. D. 646, 657, 159 N. W. 6. A woman, having signed a joint will with her husband, whereby the homestead is left to a son who, on their agreeing so to leave it, has come to live with them and to support them and has done so for fifteen years, can not, on the death of her husband, revoke the contractual features of the will as being invalid.—*Torgerson v. Hauge*, 34 N. D. 646, 657, 159 N. W. 6. The survivor of a mutual will contract can not revoke same after the death of the other without revocation.—*Prince v. Prince*, 64 Wash. 552, 696, 117 Pac. 258.

REFERENCES.

Right to change will as affected by contract.—See note 14 L. R. A. 861.

(3) *Manner of revocation.*—A revocation of a will is made where the testator obliterates or cancels his name, where it appears in the will, and where such obliteration is made in the presence of witnesses to whom the testator states that the will is revoked.—*In re Glass' Estate*, 14 Colo. App. 377, 60 Pac. 186, 187. Any obliteration or cancellation is effective to revoke a will, if done with an intent to destroy the instrument, and render it ineffectual for the purposes for which it was originally executed.—*In re Glass' Estate*, 14 Colo. App. 377, 60 Pac. 186, 188. A conveyance of property to the devisee, subsequent to the execution of a will, does not operate as a revocation of the will.—*Woodward v. Woodward*, 33 Colo. 457, 81 Pac. 322, 323. The execution of a subsequent power of attorney, by a testator, to his wife named in his will as executrix, ceases to be operative upon the death of the testator, and its execution can, in no sense, be given effect as a revocation of a prior, duly executed will.—*In re Kilborn*, 5 Cal. App. 161, 89 Pac. 985, 986. A will executed by the testator, and delivered to the residuary legatee, is not a contract in any sense of the term. No obligations are assumed thereunder, and the testator has full liberty to revoke it at any time.—*Richardson v. Orth*, 40 Or. 252, 66 Pac. 925. A will is subject to change at any time before the death of the testator, whether by the latter's adding a codicil, or by his making a new will, or by his selling or con-

suming the property devised or bequeathed.—*In re Willson's Estate*, 85 Or. 604, 167 Pac. 580; *Mackin v. Noad*, 86 Or. 221, 167 Pac. 585. A written will can be revoked in two ways only: 1. By another instrument, executed with the same formalities of a will; and 2. By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator.—*Estate of Silva*, 169 Cal. 116, 145 Pac. 1015. Accidental destruction, as by conflagration, does not revoke.—*In re Patterson's Estate*, 155 Cal. 626, 102 Pac. 941, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, 26 L. R. A. (N. S.) 654. A testator does not revoke a will, formally executed and attested, by referring to it in a letter, therein regretting having made it, and stating an intention to destroy it.—*Tuckerman v. Berry* (Colo.), 164 Pac. 721. The conveyance, by an intestate, of a part of devised property impliedly revokes such devise pro tanto.—*Watson v. McLench*, 57 Or. 446, 451, 110 Pac. 482, 112 Pac. 416.

REFERENCES.

What constitutes a testamentary writing.—See note, 89 Am. St. 486. Effect on validity of will of statute passed after death of testator.—See note Ann. Cas. 1912D, 348. Revocation of will by subsequent will, and revival of first by destruction of second.—See notes 37 L. R. A. 561-579. Cancellation or mutilation of will as affected by invalidity of a second will.—See note 6 L. R. A. (N. S.) 1107-1110. Revocation, revival, and republication of will.—See notes 5 L. R. A. 346, 7 L. R. A. 485-488, 28 Am. St. Rep. 344-362. Revival of will by destruction of revoking will.—See note 4 Am. & Eng. Ann. Cas. 313. Revocation, dependent relative, doctrine of.—See note 1 Am. & Eng. Ann. Cas. 609. Consult notes to the following sections of *Kerr's Cal. Cyc. Civ. Code* as to the matters indicated: Revocation of written will, § 1292; revocation of will executed in duplicate, § 1295; revocation by subsequent will, § 1296; revocation of will as revoking all codicils, § 1305; provisions as to revocations in statute, to what wills applicable, § 1374; mortgage or other lien not a revocation of will, § 1302; conveyance, when not a revocation, § 1303; when a revocation, § 1304; agreement for sale of property disposed of by will, not a revocation, § 1301; antecedent will, when not revived by revocation of subsequent will, § 1297.

2. Facts and evidence relating to.—That the will was in the possession of the testator from the time of its execution until his death; that immediately after his death it was found among his effects; and that, when so found, ink-lines were drawn over and through the name of the person originally named therein as executrix, constitute circumstances sufficient to warrant the court in making a finding that the partial obliteration or cancellation was made by the testator.—*Estate of Wikman*, 148 Cal. 642, 84 Pac. 212, 214. See, also, *Estate of Olmstead*, 122 Cal. 224, 54 Pac. 745. Where a will partially obliterated or canceled is found in the possession of the testator, a presumption arises that the obliteration or cancellation was his act, done with intent to cancel or

revoke in part or in entirety, as the case may be.—*Estate of Wikman*, 148 Cal. 642, 84 Pac. 212, 214. The force of evidence tending to show that the testator did not mean to revoke his will is overcome by proof of positive declarations by him made to his wife and other members of his family, that because of some real or fancied grievance, he had in fact destroyed and revoked the will, and intended that his heirs should share and share alike in his estate.—*In re McCoy's Estate*, 49 Or. 579, 90 Pac. 1105, 1106. On a contention, that a woman, who had executed the revocation of a will of hers then existing, was not of disposing mind, the testimony of physicians, tending so to prove, should not outweigh, as evidence, that of the revocation itself, drawn in her own handwriting, and the testimony of friends who were frequently with her during the period.—*In re Richardson's Estate*, *Booth v. Richardson*, 96 Wash. 123, 165 Pac. 656.

REFERENCES.

Evidence of revocation of will.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1293. Declarations, subsequent, of testator on issue of revocation of will, admissibility of.—See note 10 *Am. & Eng. Ann. Cas.* 535.

3. *Revocation of devise.*—Revocation of a trust created by a trust deed can not be made by a will, where, in the deed of trust, the reservation of power to revoke or to modify is limited to a certain particular way, and where the attempted revocation by will is without the reservation of power prescribed by the trust deed.—*Carpenter v. Cook*, 128 Cal. 1, 60 Pac. 475. A devise of land, whether special or general, is revoked under section 1304 of the Civil Code of California, by a sale of the land before the death of the testator, where such sale is wholly inconsistent with the devise.—*Estate of Benner*, 155 Cal. 153, 99 Pac. 715.

4. *Revocation by subsequent will.*—Two wills executed at different times, the latter will providing for a bequest, "according to the condition of a will now in existence," are to be taken together as forming one will, and admitted to probate as such, unless circumstances under which the last will was made prohibit such a condition, or the conditions of the two wills are so repugnant or inconsistent that they may not stand together. But if part is inconsistent, and part consistent, the first will is deemed to be revoked only to the extent of the discordant dispositions, and so far as may be necessary to give effect to the one last made.—*Whitney v. Hanington*, 36 Colo. 407, 85 Pac. 84, 87; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.), 158, 49 Am. Dec. 170. A revocatory instrument, sufficient in form to satisfy the statute, operates to revoke all prior wills.—*Chestnut v. Capey*, 45 Okla. 754, 146 Pac. 589. Though a subsequent will contains a clause expressly revoking an earlier will, yet if such subsequent will is defectively executed, the revocatory clause does not take effect.—*Leard v. Askew*, 28 Okla. 300, Ann. Cas. 1912D, 234, 114 Pac. 251. A writing executed with the solemnity of a will but which contains nothing more than the revocation of a former will is a "will" within the meaning of the Washington statute requiring

the revocation of a will to be by subsequent will, or by burning, etc.—*In re Pierce's Estate*, 63 Wash. 437, 115 Pac. 837. A will, which contains no express revocation of former wills executed by the testator, but which disposes of his entire estate so as to leave nothing for these former wills to operate upon, is a revocation in effect.—*Estate of Marx*, 174 Cal. 762, L. R. A. 1917F, 234, 164 Pac. 640. An invalid disposition in a will, in respect to the proportion of the estate left to charitable uses, does not operate to revoke a disposition in a prior will executed by the same testator, and is ineffective for any purpose.—*Estate of Marx*, 174 Cal. 762, L. R. A. 1917F, 234, 164 Pac. 640. It is not indispensable to a will revoking a former one, that it disposes specifically of all the testator's property mentioned in such former will.—*In re Ely's Estate*, 74 Or. 561, 146 Pac. 89. Though a bond covenant or agreement for a valuable consideration to convey real property, specified in a last will previously made, is not deemed a revocation of such prior devise, the voluntary conveyance for a valuable consideration by a testator of part of the land included in the devise is a revocation of the will *pro tanto*.—*Watson v. McLench*, 57 Or. 446, 110 Pac. 482, 112 Pac. 416. A deed executed by one insane to another who has knowledge of the mental capacity of the grantor, and who gives no substantial consideration for the property, is an absolute nullity, which does not operate to revoke a valid will previously made by the grantor and a devisee under the will has sufficient interest to justify him in maintaining an action against the grantee to declare the deed to be void, although there has been no prior disaffirmance of the deed, or the tender back of the nominal consideration paid by the grantee.—*Bethany Hospital Co. v. Phillippi*, 82 Kan. 64, 30 L. R. A. (N. S.) 194, 107 Pac. 530.

5. Same. Evidence.—To establish the revocation of a will by a later last will, it is enough to prove the fact clearly that a later will was made, and that it contained a clause revoking prior wills; it is not necessary to reproduce the whole substance of the second will.—*Melhase v. Melhase*, 87 Or. 590, 171 Pac. 216. If a person, without destroying a will already made by him, has made another, filling up a partly printed form in which some of the printed words go to express a revocation of all former wills, and others are "my last will and testament," the revocation is valid and effective, if satisfactory proof is had that these printed words were read over to the testator before he signed the will, and that he signed knowing they were there.—*In re Ely's Estate*, 74 Or. 561, 146 Pac. 89. Evidence sufficient on the hearing of a petition to set aside the probate of a will, to show that the testator had made a later will, revoking the one probated, and that the later will had been lost or suppressed.—*Melhase v. Melhase*, 87 Or. 590, 171 Pac. 216.

6. Revocation by codicil.—A prior will is not revoked by a codicil thereto, unless the latter contains words of express revocation or provisions wholly inconsistent with the terms of the former. In all other

cases the prior will remains effectual, so far as consistent with the provisions of the subsequent will or codicil.—*Estate of Cross*, 163 Cal. 778, 127 Pac. 70. A codicil that recites the purpose of its being made and the circumstances calling for a modification of the will, also names as executors persons other than such as the will names, to supersede the latter; but in respect to a disposition of the estate changes only that of the personalty, is merely an addition to the will, and not a revocation, unless it expressly states that it is.—*Freeman v. Hart*, 61 Colo. 455, 466, 158 Pac. 305.

REFERENCES.

Revocation of will by invalid or inoperative codicil.—See note 20 *Ann. Cas.* 1001. Revocation of codicil as affecting will.—See note 46 *L. R. A. (N. S.)* 983. Revival of will by codicil.—See note 1 *Am. & Eng. Ann. Cas.* 671.

7. Revocation by marriage, etc.—In California, where an unmarried person has made a will, and afterward marries, the marriage, whether followed by the birth of issue or not, operates, in case of the survival of the wife or children, if any, as a revocation of the will, unless specific provision has been made by the will itself, or by a marriage contract for the surviving wife, or by some settlement or provision for any surviving children of the marriage.—*Sanders v. Simcich*, 65 Cal. 50, 2 Pac. 741, 742, construing §§ 1298, 1299 of the Civil Code. Under the California statute, "a will executed by an unmarried woman is revoked by her subsequent marriage, and is not revived by the death of her husband"; but this has no application to a will executed by a married woman, whose husband was at the time living, although she subsequently, after the death of her first husband, remarried.—*Estate of Comassi*, 107 Cal. 1, 40 Pac. 15, 17, 28 *L. R. A.* 414. The marriage of the testator operates to revoke an antecedent will.—*Brown v. Sherer*, 5 Colo. App. 255, 38 Pac. 427; *Sherer v. Brown*, 21 Colo. 481, 42 Pac. 668. A will made by a single woman, who afterward marries, and which is allowed to remain, and contains no provision for, or mention of the husband, is revoked by the marriage, where the testatrix dies without issue.—*In re Petridge's Will* (Wash.), 91 Pac. 634. The marriage of a testator, whether or not it be followed by the birth of an heir, is operative to revoke an antenuptial will. It does not necessarily follow that where a statute is adopted concerning the revocation of wills, that such statute prohibits the revocation by any other means.—*In re Teopfer's Estate*, 12 N. M. 372, 67 *L. R. A.* 315, 78 Pac. 53, 54. The effect of the subsequent marriage of a man, on his previously executed will, is to revoke the will, as a matter of law, where the wife is neither mentioned in the will nor provided for by marriage contract.—*Griffing v. Gislason*, 21 S. D. 56, 109 N. W. 646, 648. The will of an unmarried woman is revoked by her subsequent marriage.—*In re Booth's Will*, 40 Or. 154, 66 Pac. 710, 712. Marriage works a change in the previous obligations and duties of a testator, in requiring him either to make due provision for his wife by will, or to leave her to the inheritance

provided by law; and where this duty is not met by the will, the marriage operates as a revocation by presumption of law.—*Morgan v. Ireland*, 1 Ida. 786, 790. A marriage, in Arizona, the wife surviving, ipso facto revokes the prior will unless the wife is mentioned or provided for as stated in paragraph 4216, Revised Statutes of 1901, of that state.—*In re Anderson's Estate*, 14 Ariz. 502, 131 Pac. 975. A will made by a man or woman, who afterwards enter into a common law marriage, is thereby revoked.—*Estate of Matteote*, 59 Colo. 566, 570, 151 Pac. 448. The subsequent marriage of a testator, without the birth of a child, does not revoke his will.—*Vanek v. Vanek*, 104 Kan. 624, 180 Pac. 240. The true construction of the statute of the state of Washington is that, if after making any will the testator shall marry and the wife shall be living at the time of the death of the testator, such will shall be deemed revoked unless the wife was provided for in the will.—*In re Adler's Estate*, 52 Wash. 539, 100 Pac. 1024. The subsequent marriage of an unmarried woman revokes her will executed before marriage, Civil Code of South Dakota, section 1024, and under section 1090, providing that the validity of wills is governed, as to real property in South Dakota, by the law of that state and as to personal property by the law of the domicile of the testator, the will of a non-resident single woman subsequently marrying, disposing of both realty and personalty, is revoked, though admitted to probate as a foreign will, so far as it relates to the real estate, but is valid so far as concerns the personalty in the state of South Dakota.—*Cornell v. Burr*, 32 S. D. 1, 141 N. W. 1083. Where the probate of a will is opposed by one who claims that the testatrix entered into a marriage with him after executing the instrument, thus revoking the latter, on proof of the claim it will be presumed that the marriage was valid.—*In re Pusey*, 173 Cal. 141, 159 Pac. 433. If a man makes a will and then marries, that revokes the will, unless provision shall have been made for her settlement, or unless she be provided for in the will, or unless she is mentioned in some such way therein as to show an intention not to make such provision; and this is true, where the husband dies before his wife, although there was an express parol understanding between them that when either should die the survivor should have no interest in the decedent's estate; where such an agreement rests in parol, it is void under the statute of frauds.—*Koontz v. Koontz*, 83 Wash. 180, 145 Pac. 201. Section 1299 of the Civil Code of California, whereby the marriage of a testator revokes an existing will of his, in case of his wife's surviving him, unless provision has been made for her by marriage contract or she is provided for in the will, has no reference to wills made after marriage; it applies only to an antenuptial will.—*Estate of Cutting*, 172 Cal. 191, Ann. Cas. 1917D, 1171, 155 Pac. 1002. There is nothing in section 1299, of the Civil Code, that precludes the republication of an antenuptial will in accordance with section 1287, nor is there anything in section 1287 to prevent the republication, after marriage, of an antenuptial will.—*Estate of Cutting*, 172 Cal. 191, Ann.

Cas. 1917D, 1171, 155 Pac. 1002. The statute of Washington applies to a will made by a woman; her will is to be deemed revoked by her subsequent marriage, under the same conditions that a will by a man is to be deemed revoked.—*In re Van Guelpen's Estate*, 87 Wash. 146, Ann. Cas. 1917C, 1037, 151 Pac. 245; *Laberee v. Root*, 87 Wash. 146, Ann. Cas. 1917C, 1037, 151 Pac. 245.

8. Same. Effect of divorce.—A will made by a married woman, if a divorce follows the marriage and the making of the will, is annulled by the second marriage of the woman.—*In re Van Guelpen's Estate*, *Laberee v. Root*, 87 Wash. 146, Ann. Cas. 1917C, 1037, 151 Pac. 245. A will is not revoked by the marriage of the testatrix where her husband obtained a decree of divorce in a sister state, from his first wife, upon an insufficient affidavit of summons; hence, in a proceeding to probate the will, contested on the ground of revocation by marriage, the proponents are entitled to show that such decree was void for want of jurisdiction, and, if they show that, an order admitting the will to probate will be affirmed.—*In re Pusey's Estate*, — (Cal.) —, 181 Pac. 648, 651.

9. Same. Revocation of consent.—A written consent that his wife might devise or bequeath away from him more than one-half of her property was freely and fairly executed by the husband in strict compliance with the statute authorizing such consent after reading the will and learning the disposition which his wife intended to make of her property. Later he gave her written notice that he had revoked such consent, and after her death he claimed that he was entitled to one-half of the property of which she died possessed. Held that the husband did not have the right to revoke the consent and was not entitled to a share of his wife's property.—*Chilsen v. Rogers*, 91 Kan. 426, 137 Pac. 936.

REFERENCES.

Effect of subsequent marriage, followed by birth of a child, to revoke a woman's will.—See note 5 L. R. A. (N. S.) 1084. Marriage of a man, effect of, on his will.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1299. Revocation of will by marriage and birth of issue.—See notes 7 Am. & Eng. Ann. Cas. 786. See note *Kerr's Cal. Cyc. Civ. Code*, § 1298. Revocation of will by divorce of testator.—See note 3 Am. & Eng. Ann. Cas. 230. Statutory revocation of will by testator's subsequent marriage, extent to which widow's interest is affected thereby.—See note 5 Am. & Eng. Ann. Cas. 795. Marriage of a woman, effect of, on her will.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1300. Whether an attempted alteration of a will revokes the instrument.—See note to *Teed's Estate*, 133 Am. St. Rep. 899. Effect of statute making wife an heir of husband, upon rule that marriage alone, without birth of issue, does not revoke a man's will.—See note 25 L. R. A. (N. S.) 182, 34 L. R. A. (N. S.) 1021. Settlement of property rights between husband and wife on account of divorce as implied revocation of will.—See note 70 L. R. A. (N. S.) 1073. Power of one lacking testamentary capacity to revoke will.—

See note 18 L. R. A. (N. S.) 99, 100. Sufficiency of provision as to after-born child to prevent revocation of will.—See note 43 L. R. A. (N. S.) 1195. Attempt to revoke portions of a will by burning, tearing, canceling, obliterating, or destroying.—See note 38 L. R. A. (N. S.) 797. Effect of interference with revocation of a will.—See note 41 L. R. A. (N. S.) 105.

CHAPTER II.

INTERPRETATION OF WILLS, AND EFFECT OF VARIOUS PROVISIONS.

- § 901. Testator's intention to be carried out.
- § 902. Intention to be ascertained from the will.
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CONSTRUCTION AND INTERPRETATION OF WILLS.

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 - (1) Bequeath and devise.
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 - (3) Children.
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 - (6) Divide.
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 - (11) Leave.
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 - (14) Near.
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25. Advancements.
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27. Evidence.
28. Agreement not to contest will.
29. Forfeiture in case of contest.
30. Nuncupative wills.
31. Foreign wills.

§ 901. Testator's intention to be carried out.

A will is to be construed according to the intention of the testator. Where his intention can not have effect to its full extent, it must have effect as far as possible.—*Kerr's Cyc. Civ. Code*, § 1317.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 590.

Montana*—Revised Codes of 1907, section 4763.

North Dakota*—Compiled Laws of 1913, section 5685.

Oklahoma*—Revised Laws of 1910, section 8381.

Oregon—Lord's Oregon Laws, section 7347.

South Dakota*—Compiled Laws of 1913, section 3343.

Utah*—Compiled Laws of 1907, section 2767.

§ 902. Intention to be ascertained from the will.

In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.—*Kerr's Cyc. Civ. Code*, § 1318.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4764.

North Dakota*—Compiled Laws of 1913, section 5686.

Oklahoma*—Revised Laws of 1910, section 8382.

South Dakota*—Compiled Laws of 1913, section 3344.

Utah*—Compiled Laws of 1907, section 2768.

§ 903. Rules of interpretation.

In interpreting a will, subject to the law of this state, the rules prescribed by the following sections of this chapter are to be observed, unless an intention to the contrary clearly appears.—*Kerr's Cyc. Civ. Code*, § 1319.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4765.

Oklahoma*—Revised Laws of 1910, section 8383.

South Dakota*—Compiled Laws of 1913, section 3345.

Utah*—Compiled Laws of 1907, section 2769.

§ 904. Several instruments are to be taken together.

Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument.—*Kerr's Cyc. Civ. Code*, § 1320.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4766.

North Dakota*—Compiled Laws of 1913, section 5688.

Oklahoma*—Revised Laws of 1910, section 8384.

South Dakota*—Compiled Laws of 1913, section 3346.

Utah*—Compiled Laws of 1907, section 2770.

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§ 905. Harmonizing various parts.

All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.—*Kerr's Cyc. Civ. Code*, § 1321.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4767.

North Dakota*—Compiled Laws of 1913, section 5689.

Oklahoma*—Revised Laws of 1910, section 8385.

South Dakota*—Compiled Laws of 1913, section 3347.

Utah*—Compiled Laws of 1907, section 2771.

§ 906. In what case devise is not affected.

A clear and distinct devise or bequest can not be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.—*Kerr's Cyc. Civ. Code*, § 1322.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4768.

North Dakota*—Compiled Laws of 1913, section 5690.

Oklahoma*—Revised Laws of 1910, section 8386.

South Dakota*—Compiled Laws of 1913, section 3348.

Utah*—Compiled Laws of 1907, section 2772.

§ 907. When ambiguous or doubtful.

Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will.—*Kerr's Cyc. Civ. Code*, § 1323.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4769.

North Dakota*—Compiled Laws of 1913, section 5691.

Oklahoma*—Revised Laws of 1910, section 8387.

South Dakota*—Compiled Laws of 1913, section 3349.

Utah*—Compiled Laws of 1907, section 2773.

§ 908. Words taken in ordinary sense.

The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained.—*Kerr's Cyc. Civ. Code*, § 1324.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4770.

North Dakota*—Compiled Laws of 1913, section 5692.

Oklahoma*—Revised Laws of 1910, section 8388.

South Dakota*—Compiled Laws of 1913, section 3350.

Utah*—Compiled Laws of 1907, section 2774.

§ 909. Words to receive an operative construction.

The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative.—*Kerr's Cyc. Civ. Code*, § 1325.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4771.

North Dakota*—Compiled Laws of 1913, section 5693.

Oklahoma*—Revised Laws of 1910, section 8389.

South Dakota*—Compiled Laws of 1913, section 3351.

Utah*—Compiled Laws of 1907, section 2775.

§ 910. Intestacy, to be avoided.

Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy.—*Kerr's Cyc. Civ. Code*, § 1326.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Hawaii—Revised Laws of 1915, section 3268.

Montana*—Revised Codes of 1907, section 4772.

North Dakota*—Compiled Laws of 1913, section 5694.

Oklahoma*—Revised Laws of 1910, section 8390.

South Dakota*—Compiled Laws of 1913, section 3352.

Utah*—Compiled Laws of 1907, section 2776.

§ 911. Effect of technical words.

Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a con-

trary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense.—*Kerr's Cyc. Civ. Code*, § 1327.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Montana—Revised Codes of 1907, section 4773.

North Dakota—Compiled Laws of 1913, section 5695.

Oklahoma—Revised Laws of 1910, section 8391.

South Dakota—Compiled Laws of 1913, section 3353.

Utah—Compiled Laws of 1907, section 2777.

§ 912. Technical words not necessary.

Technical words are not necessary to give effect to any species of disposition by a will.—*Kerr's Cyc. Civ. Code*, § 1328.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4774.

North Dakota*—Compiled Laws of 1913, section 5696.

Oklahoma*—Revised Laws of 1910, section 8392.

South Dakota*—Compiled Laws of 1913, section 3354.

Utah*—Compiled Laws of 1907, section 2778.

§ 913. Certain words not necessary to pass a fee.

The term "heirs," or other words of inheritance, are not requisite to devise a fee, and a devise of real property passes all the estate of the testator, unless otherwise limited.—*Kerr's Cyc. Civ. Code*, § 1329.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4775.

North Dakota*—Compiled Laws of 1913, section 5697.

Oklahoma*—Revised Laws of 1910, section 8393.

South Dakota*—Compiled Laws of 1913, section 3355.

Utah*—Compiled Laws of 1907, section 2779.

§ 914. Power to devise, how executed by terms of will.

Real or personal property embraced in a power to devise, passes by a will purporting to devise all the real or personal property of the testator.—*Kerr's Cyc. Civ. Code*, § 1330.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana*—Revised Codes of 1907, section 4776.
- North Dakota*—Compiled Laws of 1913, section 5698.
- Oklahoma*—Revised Laws of 1910, section 8394.
- South Dakota*—Compiled Laws of 1913, section 3356.
- Utah*—Compiled Laws of 1907, section 2780.

§ 915. Devise or bequest of all real or all personal property, or both.

A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death.—*Kerr's Cyc. Civ. Code*, § 1331.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana*—Revised Codes of 1907, section 4777.
- North Dakota*—Compiled Laws of 1913, section 5699.
- Oklahoma*—Revised Laws of 1910, section 8395.
- South Dakota*—Compiled Laws of 1913, section 3357.
- Utah*—Compiled Laws of 1907, section 2781.

§ 916. Residuary clauses.

A devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will.—*Kerr's Cyc. Civ. Code*, § 1332.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana*—Revised Codes of 1907, section 4778.
- North Dakota*—Compiled Laws of 1913, section 5700.
- Oklahoma*—Revised Laws of 1910, section 8396.
- South Dakota*—Compiled Laws of 1913, section 3358.
- Utah*—Compiled Laws of 1907, section 2782.

§ 917. Same. Bequest of residue, effect.

A bequest of the residue of the testator's personal property, passes all the personal property which he was entitled to bequeath at the time of his death, not other-

wise effectually bequeathed by his will.—*Kerr's Cyc. Civ. Code*, § 1333.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4779.

North Dakota*—Compiled Laws of 1913, section 5701.

Oklahoma*—Revised Laws of 1910, section 8397.

South Dakota*—Compiled Laws of 1913, section 3359.

Utah*—Compiled Laws of 1907, section 2783.

§ 918. "Heirs," "relatives," "issue," "descendants," etc.

A testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representatives," or "personal representatives," or "family," "issue," "descendants," "nearest" or "next of kin," of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on succession, in this code.—*Kerr's Cyc. Civ. Code*, § 1334.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 586.

Kansas—General Statutes of 1915, section 11808.

Montana*—Revised Codes of 1907, section 4780.

North Dakota*—Compiled Laws of 1913, section 5702.

Oklahoma*—Revised Laws of 1910, section 8398.

Oregon—Lord's Oregon Laws, section 7343.

South Dakota*—Compiled Laws of 1913, section 3360.

Utah*—Compiled Laws of 1907, section 2784.

§ 919. Words of donation and of limitation.

The terms mentioned in the last section are used as words of donation, and not of limitation, when the property is given to the person so designated, directly, and not as a qualification of an estate given to the ancestor of such person.—*Kerr's Cyc. Civ. Code*, § 1335.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska—Compiled Laws of 1913, section 586.
 Kansas—General Statutes of 1915, section 11808.
 Montana*—Revised Codes of 1907, section 4781.
 North Dakota*—Compiled Laws of 1913, section 5703.
 Oklahoma*—Revised Laws of 1910, section 8399.
 Oregon—Lord's Oregon Laws, section 7343.
 South Dakota*—Compiled Laws of 1913, section 3361.
 Utah*—Compiled Laws of 1907, section 2785.

§ 920. To what time words refer.

Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.—*Kerr's Cyc. Civ. Code*, § 1336.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana*—Revised Codes of 1907, section 4782.
 North Dakota*—Compiled Laws of 1913, section 5704.
 Oklahoma*—Revised Laws of 1910, section 8400.
 South Dakota*—Compiled Laws of 1913, section 3362.
 Utah*—Compiled Laws of 1907, section 2786.

§ 921. Devise or bequest to a class.

A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed.—*Kerr's Cyc. Civ. Code*, § 1337.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana*—Revised Codes of 1907, section 4783.
 North Dakota*—Compiled Laws of 1913, section 5705.
 Oklahoma*—Revised Laws of 1910, section 8401.
 South Dakota*—Compiled Laws of 1913, section 3363.
 Utah*—Compiled Laws of 1907, section 2787.

§ 922. When conversion takes effect.

When a will directs the conversion of real property into money, such property and all its proceeds must be

deemed personal property from the time of the testator's death.—*Kerr's Cyc. Civ. Code*, § 1338.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4784.

North Dakota*—Compiled Laws of 1913, section 5706.

Oklahoma*—Revised Laws of 1910, section 8402.

South Dakota*—Compiled Laws of 1913, section 3364.

Utah*—Compiled Laws of 1907, section 2788.

§ 923. When after-born child takes under will.

A child conceived before, but not born until after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class.—*Kerr's Cyc. Civ. Code*, § 1339.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4785.

North Dakota*—Compiled Laws of 1913, section 5707.

Oklahoma*—Revised Laws of 1910, section 8403.

South Dakota*—Compiled Laws of 1913, section 3365.

Utah*—Compiled Laws of 1907, section 2789.

§ 924. Mistakes and omissions.

When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions can not be received.—*Kerr's Cyc. Civ. Code*, § 1340.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4786.

North Dakota*—Compiled Laws of 1913, section 5708.

Oklahoma*—Revised Laws of 1910, section 8404.

South Dakota*—Compiled Laws of 1913, section 3366.

Utah*—Compiled Laws of 1907, section 2790.

§ 925. When devises and bequests vest.

Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death.—*Kerr's Cyc. Civ. Code*, § 1341.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4787.

North Dakota*—Compiled Laws of 1913, section 5709.

Oklahoma*—Revised Laws of 1910, section 8405.

South Dakota*—Compiled Laws of 1913, section 3367.

Utah*—Compiled Laws of 1907, section 2791.

§ 926. When can not be divested.

A testamentary disposition, when vested, can not be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose.—*Kerr's Cyc. Civ. Code*, § 1342.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4788.

North Dakota*—Compiled Laws of 1913, section 5710.

Oklahoma*—Revised Laws of 1910, section 8406.

South Dakota*—Compiled Laws of 1913, section 3368.

Utah*—Compiled Laws of 1907, section 2792.

§ 927. Death of devisee or legatee.

If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, except as provided in section thirteen hundred and ten.—*Kerr's Cyc. Civ. Code*, § 1343.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4789.

North Dakota*—Compiled Laws of 1913, section 5711.

Oklahoma*—Revised Laws of 1910, section 8407.

South Dakota*—Compiled Laws of 1913, section 3369.

Utah*—Compiled Laws of 1907, section 2793.

§ 928. Interests in remainder are not affected.

The death of a devisee or legatee of a limited interest before the testator's death does not defeat the interests of persons in remainder, who survive the testator.—*Kerr's Cyc. Civ. Code*, § 1344.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4790.

North Dakota*—Compiled Laws of 1913, section 5712.

Oklahoma*—Revised Laws of 1910, section 8408.

South Dakota*—Compiled Laws of 1913, section 3370.

Utah*—Compiled Laws of 1907, section 2794.

§ 929. Conditional devises and bequests.

A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.—*Kerr's Cyc. Civ. Code*, § 1345.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4791.

North Dakota*—Compiled Laws of 1913, section 5713.

Oklahoma*—Revised Laws of 1910, section 8409.

South Dakota*—Compiled Laws of 1913, section 3371.

Utah*—Compiled Laws of 1907, section 2795.

§ 930. Condition precedent, what.

A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect.—*Kerr's Cyc. Civ. Code*, § 1346.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4792.

North Dakota*—Compiled Laws of 1913, section 5714.

Oklahoma*—Revised Laws of 1910, section 8410.

South Dakota*—Compiled Laws of 1913, section 3372.

Utah*—Compiled Laws of 1907, section 2796.

§ 931. Condition precedent, effect of.

Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is ful-

filled, except where such fulfillment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to the testator, or arose from an unavoidable event subsequent to the execution of the will.—*Kerr's Cyc. Civ. Code*, § 1347.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4793.

North Dakota*—Compiled Laws of 1913, section 5715.

Oklahoma*—Revised Laws of 1910, section 8411.

South Dakota*—Compiled Laws of 1913, section 3373.

Utah*—Compiled Laws of 1907, section 2797.

§ 932. Condition precedent, when deemed performed.

A condition precedent in a will is to be deemed performed when the testator's intention has been substantially, though not literally, complied with.—*Kerr's Cyc. Civ. Code*, § 1348.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4794.

North Dakota*—Compiled Laws of 1913, section 5716.

Oklahoma*—Revised Laws of 1910, section 8412.

South Dakota*—Compiled Laws of 1913, section 3374.

Utah*—Compiled Laws of 1907, section 2798.

§ 933. Condition subsequent, what.

A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event.—*Kerr's Cyc. Civ. Code*, § 1349.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4795.

North Dakota*—Compiled Laws of 1913, section 5717.

Oklahoma*—Revised Laws of 1910, section 8413.

South Dakota*—Compiled Laws of 1913, section 3375.

Utah*—Compiled Laws of 1907, section 2799.

§ 934. Devisees, etc., take as tenants in common.

A devise or legacy given to more than one person vests in them as owners in common.—*Kerr's Cyc. Civ. Code*, § 1350.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4796.

North Dakota*—Compiled Laws of 1913, section 5718.

Oklahoma*—Revised Laws of 1910, section 8414.

South Dakota*—Compiled Laws of 1913, section 3376.

Utah*—Compiled Laws of 1907, section 2800.

§ 935. Advancements, when adempments.

Advancements or gifts are not to be taken as adempments of general legacies, unless such intention is expressed by the testator in writing.—*Kerr's Cyc. Civ. Code*, § 1351.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4797.

North Dakota*—Compiled Laws of 1913, section 5719.

Oklahoma*—Revised Laws of 1910, section 8415.

South Dakota*—Compiled Laws of 1913, section 3377.

Utah*—Compiled Laws of 1907, section 2801.

CONSTRUCTION AND INTERPRETATION OF WILLS.

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1. Various questions.

(1) In general.—The interpretation of a will is a matter of law, to be determined from the language used in the will, and from the facts and circumstances in proof in the matter.—*In re Seay's Estate*, Marsh v. Seay (Cal.), 181 Pac. 58, 59. Although the construction of a will is ordinarily a question for the determination of the probate court, where it arises collaterally in a suit in equity the court of equity has jurisdiction to make the construction.—*Adams v. Prather*, 176 Cal. 33, 167 Pac. 534, 538. A will held not to have been an alienation or conveyance of a homestead.—*Postlethwaite v. Edson*, 102 Kan. 104, 111, L. R. A. 1918D, 983, 171 Pac. 769. That construction of a will which leads to the conclusion that a remainder is vested is to be taken rather than one which leads to the conclusion that it is contingent.—*Estate of Whitney*, 176 Cal. 12, 167 Pac. 399. The trial court has jurisdiction ordinarily to construe a will, and it is so therefore, in a case where a referee in bankruptcy directs the trustee to bring suit to have a determination as to whether the bankrupt estate includes an interest in land under a will.—*Scott v. Gillespie*, 103 Kan. 745, 176 Pac. 132. The rules of construction contained in the code applied to the provisions of the will of a married woman giving all her property to her husband and appointing him executor to sell any or all of her real estate and personal property without an order of court, and on his death one-half the unexpended portion of the testatrix's estate is bequeathed to a specified niece and the other half to be divided among a class and it was held that the gift to the husband was modified by the subsequent provisions, and that while he took the estate for life and had the power to consume or to dispose of it, so that persons dealing with him in good faith were entitled to the same protection as though he were the absolute owner, yet he could not make a gift of the estate in his lifetime or dispose of it by will.—*Adams v. Prather*, 176 Cal. 33, 167 Pac. 534, 537. The legislature, in enacting, in effect,

that when a devisee under a will dies before the testator, and leaves lineal descendants who survive the testator, these shall take in place of the devisee named, did not intend that the enactment should extend to a legatee.—*In re Estate of Lewis*, 39 Nev. 445, 455, 4 A. L. R. 241, 159 Pac. 961. A proviso contained in a will limits the operation of the clause or general statement immediately preceding it, unless it appears from the whole sentence preceding that its reference is to the entire general provision of which such clause is a part.—*In re Bovier's Estate* (Utah), 172 Pac. 683. The fact that the widow elects not to take under the will of her deceased husband, who died leaving no issue, does not prevent effect from being given to a disposition, under the will, of one-half the testator's estate, including exempt personalty, to outside persons.—*Breen v. Davies*, 94 Kan. 474, 146 Pac. 1147. A will is the reverse of a deed or of a bill of sale, which must take effect on its execution or not at all; it can only operate in that it become effective in passing an interest—after death.—*Taylor v. Wilder* (Colo.), 165 Pac. 769. A will speaks only from the death of the testator, unless a contrary intention is manifest from the language of the will or its provisions.—*In re Wilson's Estate*, 85 Or. 604, 167 Pac. 580; *Mackin v. Noad*, 86 Or. 221, 167 Pac. 585. A will which recites that "All the property of which I am now possessed is the community property of myself and my wife," and specifies advancements made to the testator's wife and daughters, implies that at the time of its execution the testator was mindful of gifts *inter vivos* made by him, and that the whole of his estate remaining was affected by a half interest held by his wife.—*Flint v. Flint* (Cal.), 177 Pac. 451. Where a man who died childless, leaving property accumulated by himself and his wife jointly, and in which the two regarded themselves as equal partners, and who, in a codicil to his will, directed that "the dividing of said property shall not take place until the death of my wife," the language of the codicil indicates that in so directing he had the partnership idea in his mind.—*Maling v. Maling* (Or.), 217 Fed. 127, 130.

(2) *Validity*.—It is necessary, to constitute a complete and valid testamentary gift, that the testator shall have executed a writing containing words which expressly or by implication designate both the subject of the gift and the person to whom it was given.—*Mercer v. Kirkpatrick*, 22 Haw. 644, 648. A will containing language going no farther than to revoke a previous will would be valid.—*Sullivan v. Murphy* (Or.), 179 Pac. 680. It is not necessary to make a will valid that the instrument should dispose of the testator's entire property; a single bequest, however small, would be valid if no other property were disposed of.—*Sullivan v. Murphy* (Or.), 179 Pac. 680. If a will contains several distinct provisions, one of which at least is lawful, and one of which at least is unlawful in whole or in part, the devise should be declared void as to the latter but valid as to the other.—*Logan v. Schoolfield*, 55 Okla. 582, 155 Pac. 592. A person who, by the will of a testatrix, was made the trustee of a large part of her estate,

to invest and reinvest the same and to pay over the income for certain designated purposes, is not the "principal beneficiary" in the will, within the meaning of a statute respecting the validity of a will written or prepared by the principal beneficiary therein, though the will contains a provision that such person "be paid reasonable compensation for his services."—*Bauer v. Myers* (Kan.), 244 Fed. 902, 908.

(3) Construction of words and provisions.—Where terms are free from ambiguity, they must be interpreted according to their ordinary meaning and legal import.—*In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287. In construing a will the meaning of the words used will be expounded or restricted so as best to express the purpose and intent of the testator.—*Bair v. Blair*, 82 Kan. 464, 108 Pac. 827. Words occurring more than once are presumptively used in the same sense.—*In re Goetz's Estate*, 13 Cal. App. 266, 109 Pac. 105. Words should be given their usual meanings unless apparently used in a different sense.—*Fancher v. Fancher*, 156 Cal. 13, 19 Ann. Cas. 1157, 23 L. R. A. (N. S.) 944, 103 Pac. 206. Testator's intention as to meaning of particular words will be given effect.—*In re Hite's Estate*, 155 Cal. 436, 17 Ann. Cas. 993, 21 L. R. A. (N. S.) 953, 101 Pac. 443. Omitted words will be supplied in a will where it is evident the testator has not expressed himself as he intended.—*In re Peters' Estate*, *Nuhse v. Peterson*, 101 Wash. 572, 172 Pac. 870. Whole will may be examined and words interpolated or transposed.—*In re Goetz's Estate*, 13 Cal. App. 292, 109 Pac. 492. If a will provides for a legacy to employees, the word "employees" refers only to those in regular and continual service. It does not refer to one who is engaged in rendering services in a particular transaction, and whose engagement is rather that of a contractor than that of an employee.—*In re Klein's Estate*, 35 Mont. 185, 88 Pac. 798. Whenever necessary, in order to ascertain the intent with which words are used, and to give them effect when their meaning is ascertained, the disjunctive "or" will be read conjunctively, and vice versa.—*Noble v. Teeple*, 58 Kan. 398, 49 Pac. 598, 599. Where a will recites, "I do declare hereby that I have by deed of gift conveyed, subject to the incumbrances thereon, to my wife, certain mortgaged premises, etc.," the deed of gift, although silent as to the mortgage, will not support a covenant, by implication, against the incumbrances. The executors are therefore not authorized to pay out of the estate a claim for the amount of the incumbrances upon the property, and an order surcharging their account with such amount if paid is proper.—*Estate of Wells*, 7 Cal. App. 515, 94 Pac. 856, 857. By a bequest, "of my books," a testator can not be said to have meant to bequeath money in bank, evidenced by bank-books.—*Estate of Jeffreys*, 1 Cal. App. 524, 82 Pac. 549. Where a testator makes a provision in his will for the employees of a "firm" who had been such for a period of one year immediately prior to his death, in which firm he was interested, and which was a copartnership at the time of the execution of the will, and later, became an incorporated concern under the same name;

the word "firm" will not be given a technical and restricted meaning. It would apply to all such employees who had served the required period, whether of the copartnership or of the corporation.—In *re Klein's Estate*, 35 Mont. 185, 88 Pac. 798. A clause in a will as follows: "The property herein specifically bequeathed or devised shall be delivered when," etc., applies to property in existence and owned by the testator at the time of his death, and which was specifically bequeathed or devised.—In *re Campbell's Estate*, 27 Utah 361, 75 Pac. 851, 853. The word "ornaments," in its general and ordinary sense, includes articles of jewelry, and where a bequest was made of "so many of my books, pictures, and ornaments," not otherwise bequeathed specifically, "as she (the donee) shall choose to take," the words "as she shall choose to take," will be liberally construed in favor of the legatee.—*Estate of Traylor*, 75 Cal. 189, 16 Pac. 774. Where an instrument, having a purpose to transfer property from the maker to some other person, contains a clause reciting, after language of conveyance, the words "my library, of which she is to take immediate possession," this clause passes a present interest, rather than a future one as in the case of a will.—*Taylor v. Wilder (Colo.)*, 165 Pac. 766. In Oregon the term "heirs" or other words of inheritance are not necessary to create or convey an estate in fee simple, under L. O. L., section 7103, and under section 7344 a devise of real property is to be taken as a devise of all the estate or interest of the testator therein unless it clearly appears that he intended to devise a less estate or interest.—*Irvine v. Irvine*, 69 Or. 187, 136 Pac. 19. The absence of the word "heirs" from the codicil of a will does not necessarily imply that a life estate only was given, as words of inheritance are not essential to create or to transfer an estate in fee simple; hence, where an absolute estate by a codicil, any attempt to limit the will will not be sanctioned.—*Love v. Walker*, 59 Or. 95, 115 Pac. 296. Where a testator having ample means makes a liberal provision for the "support and maintenance" of his widow, those words will be given a broad and liberal significance when no language is used in connection therewith which tends to restrict or limit their meaning.—*Blair v. Blair*, 82 Kan. 464, 108 Pac. 827. A mortgage conveys no title and is not a finality of disposition of property, the title remaining in the mortgagor; it is not, therefore, included in the expression "dispose of," as used in a will.—*Beakey v. Knutson*, 90 Or. 574, 174 Pac. 1149, 177 Pac. 955. If a testator refers to a "beloved cousin" and, wishing to provide for her during her lifetime "so that she may be relieved from anxiety in her old age," directs his executors to buy up any mortgage that may encumber her property and dispend with the payment of interest on it during such lifetime, and directs them also to improve her property, mentioning stock left by him sufficient of which, for these purposes he "authorizes" them to sell; this is a charge on the estate, rather than a legacy.—*School District v. International Trust Co.*, 59 Colo. 486, 495, 149 Pac. 620.

REFERENCES.

"Effects," testamentary gift of, will be construed to include real property.—See note 7 Am. & Eng. Ann. Cas. 128. Consult notes to the following sections of Kerr's Cal. Cyc. Civ. Code, as to the subjects indicated: Technical words, effect of, § 1327; technical words not necessary, § 1328; words generally to be given their ordinary and grammatical sense, § 1324; words referring to death or survivorship, effect of, § 1336; particular words construed, as "aforesaid," "between," "children," "grandchildren," "nephew," "niece," "cousin," "desire," "family," "herein," "money," "ornaments," "property," "pro rata," "residue," "revert," § 1324.

(4) Construing instruments together.—Two wills by the same testator, in the execution of both of which the statutory requirements have been met must be construed together unless the former has been revoked by the testator as required by the statute.—*In re Noyes' Estate*, 40 Mont. 231, 106 Pac. 357. A will and codicils thereto are to be inquired into, for their legal effect, singly or as relating to the others, at the full hearing on the question of admitting the wills and codicils to probate, and not before.—*Freeman v. Hart*, 61 Colo. 455, 469, 158 Pac. 305. Two codicils of a will, made within a few days of each other, are to be read together.—*In re Kelley's Estate*, 178 Cal. 523, 174 Pac. 35. An instrument in writing may be, as to one portion, a contract of sale, and, as to another portion, a will; but it is non-effective in the latter character unless executed in the manner and form required in the execution of a will.—*Taylor v. Wilder* (Colo.), 165 Pac. 766. A will is not a conveyance or an alienation of the real estate described therein.—*Postlethwaite v. Edson*, 102 Kan. 619, L. R. A. 1918D, 989, 171 Pac. 769, 774. In determining whether an instrument is a will or a present conveyance, it should be given the character shown on its face to be so intended, and the purpose of the maker should control; but that purpose must be determined from the language used, other evidence being admitted only to explain ambiguities.—*Coburn v. Simpson*, 102 Kan. 234, 236, 170 Pac. 383. An instrument, probably intended as a will, but the execution of which does not conform to the law relating to wills, may be regarded as a deed, if such execution conforms to the law relating to deeds.—*Clark v. Boulter's Estate*, 62 Colo. 465, 163 Pac. 965. If an instrument can not be given effect as a will, but can as a deed, will be construed to be the latter.—*Clark v. Boulter's Estate*, 62 Colo. 465, 163 Pac. 965. Unless the clear intent of the maker is to the contrary, a writing, not so executed as to be good as a will, should be given effect as a deed if good as a deed; and a writing not so executed as to be good as a deed should be given effect as a will if good as a will.—*Trumbauer v. Rust*, 36 S. D. 301, 307, 154 N. W. 801. All instruments testamentary in character, executed by the same testator, are to be construed as one instrument.—*Estate of Cross*, 163 Cal. 778, 127 Pac. 70. The provisions of section 1320 of the Civil Code of California requiring several testamentary instruments

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by the same testator to be construed together as one instrument has no application in a case where the later will contains no reference to the earlier one, is not a codicil to it, and appears to be wholly independent of it, its provisions prevailing over inconsistent provisions of the earlier will merely because, in the particular covered by it, it is a later expression of testamentary wishes.—*In re Bergland's Estate* (Cal.), 182 Pac. 277, 278. A paper not testamentary in character may be construed with one having that character, when the latter has, by proper reference to the former, incorporated it within itself. But before an instrument may be incorporated in another by reference, the reference must be certain, clear, and unambiguous.—*Estate of Anthony*, 21 Cal. App. 157, 131 Pac. 96. Where it is sought to import into a later will conditions found in an earlier instrument by the same testator, under the guise of construction of testamentary intent, this can be justified only when the circumstances show affirmatively that the testamentary intent of the decedent, at the time of his last expression, included not merely the matters which he then set down, but those also which he had set down on a previous occasion.—*In re Bergland's Estate* (Cal.), 182 Pac. 277, 279. A revoked will can not be admitted to throw light upon the will revoking it; for the later will must be interpreted by its own language, and not varied or explained by an instrument of the sort executed at some previous time.—*Estate of Vanderhurst*, 171 Cal. 553, 154 Pac. 5.

(5) *Restraint upon marriage.*—A testator by one paragraph of his will gave the entire use of his residuary estate to his wife for life "except as hereinafter qualified," with remainder to his son. He then provided that in the event of his wife marrying again the bequests in her favor should immediately terminate and in lieu thereof she should take one-third of his estate and the son should take the other two-thirds. The next paragraph provided that in the event of the son predeceasing the testator without issue the entire estate should go to the wife absolutely. It was held that the provisions of the will did not manifest any intention on the part of the testator to restrain or discourage marriage by his widow, but simply postponed any division of the residue between her and the son while she remained unmarried and that there was nothing in the language of the will creating any prohibited condition imposing a restraint upon marriage.—*Estate of Fitzgerald*, 161 Cal. 319, 49 L. R. A. (N. S.) 615, 119 Pac. 96. A bequest to a woman, "provided she is lawfully divorced from her husband, and still bears his name," is not contrary to public policy as being in restraint of marriage, unless the reference is to a divorce yet to be obtained.—*In re Nichols' Estate*, *McDonald v. Imus*, 102 Wash. 303, 172 Pac. 1146. In a testator's bequest to his wife the words, "should she wish to marrie agane then then 75 per cent of the hole amount at my death will go to my children," constitute a condition in restraint of marriage, if the bequest to her otherwise is of the whole estate.—*Estate of Scott*, 170 Cal. 65, 148 Pac. 221. A condition in restraint of

marriage is void in a will, even where the devisee or legatee is the wife of the testator, and the devise or bequest over is to their children.—*Estate of Scott*, 170 Cal. 65, 148 Pac. 221.

2. Intention of the testator.

(1) *Is controlling*.—No particular words are necessary to show a testamentary intent. It must appear only that the maker intended by the instrument to dispose of property after his death, and parol evidence as to the attending circumstances is admissible. The courts will, moreover, in reading wills, always supply obviously omitted words, wherever the word omitted is apparent and no other will supply the defect.—*Mitchell v. Donohue*, 100 Cal. 202, 34 Pac. 614. No particular words are essential to create a legacy or devise. The essential thing is that the intention of the testator to make thereby the gift from the property of the estate, is shown. When such intention clearly appears, the courts will carry it into effect, if this can be done consistently with the rules of law applicable.—*Estate of Barclay*, 152 Cal. 753, 93 Pac. 1012, 1014. When land is directed to be sold under a will, and turned into money, courts, in dealing with the subject, will consider it as personalty, and will treat the land as equitably converted in the hands of the executor or trustee.—*Martin v. Moore*, 49 Wash. 288, 94 Pac. 1087, 1089. The cardinal rule of interpretation of wills is to ascertain the intention of the testator.—*In re Hartung's Estate*, 39 Nev. 200, 207, 155 Pac. 353. If a will is executed conformably to statute, and admitted to probate, it will be construed so as to give effect to the intention of the testator, if lawful and ascertainable.—*Estate of Tyrrell*, *Knauff v. Davidson*, 17 Ariz. 418, 422, 153 Pac. 767. The intention of a testator is the guide in construing the terms of his last testament and, if his design can reasonably be ascertained, it controls the disposition of his property.—*Love v. Walker*, 59 Or. 95, 115 Pac. 301. In construing the clauses of a will the purpose sought to be accomplished is to discover, if possible, the testator's intent with respect to the disposition of his property after death, and when that intention is ascertained it is controlling unless it can not be carried in effect without a violation of the rules of law.—*Kaser v. Kaser*, 68 Or. 153, 137 Pac. 189. It is a cardinal principle in the construction of wills and codicils that the intention of the testator must be ascertained, if possible, and given effect—that is, his actual, personal, individual intention, and not a mere presumptive intention, inferred from the use of set phrases or familiar form of words; and for this purpose the will should be construed liberally.—*Maling v. Maling* (Or.), 217 Fed. 127, 130. In a suit the object of which is to have the provisions of a will explained, the intent of the testator is the polar star which should guide the court in its decision.—*Rumel v. Soloman* (Utah), 180 Pac. 419. The primary consideration in the interpretation of a will is the testator's intention, and if this can be ascertained, it must govern; provided it is not contrary to a settled rule of positive law or

in violation of public policy.—*Morse v. Henlon*, 97 Kan. 399, 155 Pac. 800. The purpose of construing a will is to find out what was the testator's intent.—*Roelf's Cousins v. White*, 75 Or. 549, 147 Pac. 753; *Tyler v. Bier*, 88 Or. 430, 172 Pac. 112. A testator's wishes and directions, not precatory merely, must be followed if possible in all particulars, unless some appropriate tribunal authorizes the executor to swerve aside.—*Sakariason v. James*, 22 N. M. 437, 163 Pac. 1080. A court carries out a testator's intentions always, provided they are legal, regardless of whether they are or are not reasonable.—*In re Nichols' Estate*, *McDonald v. Imus*, 102 Wash. 303, 172 Pac. 1146. Intention includes necessary implications from language used as well as meaning of explicit language.—*In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287. The expression of one limitation on a gift, made by will, in the paragraph containing the gift excludes, by necessary implication and construction, the intent of the testator to burden, or attach to, the gift any other or additional limitations or burdens.—*Rumel v. Solomon (Utah)*, 180 Pac. 419. A specific devise of real estate, made in an early part of a will is not to be disturbed in order to give effect to general legacies afterwards made, unless it expressly appears that such was the testator's intention.—*Rumel v. Solomon (Utah)*, 180 Pac. 419. In construing a will it is the intention of the testator that must be ascertained; that being found, it controls the disposition of the property.—*In re Phelps's Estate*, *Lord v. Chipman*, 179 Cal. 703, 178 Pac. 846. The rule that in case of doubt a will should be construed in favor of a general or primary intention rather than a particular or secondary one does not apply where there is a clearly expressed intention to effect another purpose distinct and different from the general object or intention, as in such a case the particular intention will prevail.—*Lidgate v. Danford*, 23 Haw. 317, 323. Where the testator's will gave the residue of his estate to a fraternal order, the income to be paid annually, if within five years such order should establish a home for orphans and foundlings bearing his son's name, it is held that it was the intention of the testator to provide a "monument," or artificial structure, for the purpose of preserving his son's memory, and that with this in view, and that the monument might be perpetuated and not abandoned, it was not his intention to leave the matter entirely to the organization, but he left it to his trustee to pay over annually the income of the bequest.—*In re Hartung's Estate*, 40 Nev. 262, 161 Pac. 715, 716. Where a devise of land was made to K. and K., her husband "unto them and to the heirs of the body of either," and "upon default of issue," to trustees appointed by will, it was held that the testatrix intended to create an estate in fee tail, which can not exist in Hawaii, and that the devise took effect as an estate in fee simple in K. and K., it not appearing that a life estate in K. and K., with remainder to the heirs of the body of either, would more nearly carry out the intention of the testatrix.—*Kinney v. Oahu Sugar Co.*, 23 Haw. 747, 755. In construing a will the testator's inten-

tion, gathered by the consideration of the entire will, controls, and technical rules are not ever to be resorted to where the application of them defeats the testator's manifest intention.—*Lucas v. McNeill* (Kan.), 231 Fed. 672, 674.

REFERENCES.

Construction of wills, intention to govern.—See notes 3 L. R. A. 847-850; 8 L. R. A. 741-749. Interpretation, rules of, generally.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1319. Intent of testator as test of validity of will.—89 Am. St. Rep. 488.

(2) To be drawn from will.—In case of uncertainty arising upon the face of a will, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made.—*Estate of Carothers*, 161 Cal. 588, 119 Pac. 926; *Estate of Mitchell*, 160 Cal. 618, 117 Pac. 774. In arriving at intention of testator, the court must consider words of the will itself.—*In re Robinson's Estate*, 159 Cal. 608, 115 Pac. 49. Testator's intention, gathered from the entire will, controls, if consistent with the law.—*In re Washburn's Estate*, 11 Cal. App. 735, 106 Pac. 415; *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287. The intention of a testator must be determined by the language of the will.—*Estate of Whitney*, 176 Cal. 12, 167 Pac. 399. The force of a will proceeds altogether from the intent of the testator, and this must be gathered from the language of the instrument; and when this is clear and unambiguous, meaning must be given it according to its ordinary and legal import.—*In re Watts' Estate*, 179 Cal. 20, 175 Pac. 415. The rule controlling the interpretation of wills, to which all others must yield, is that the intention of the testator, as gathered from all parts of the instrument, is to be given effect.—*Otis v. Otis*, 104 Kan. 88, 177 Pac. 520. The cardinal rule for the construction of all wills is to ascertain the intention of the testator, and this intention is to be ascertained from the words of his will, taking into view, when necessary or appropriate, the circumstances under which it was made, if there is an uncertainty in its language.—*Estate of Mitchell*, 160 Cal. 618, 117 Pac. 774. The cardinal rule in the construction of wills is to have regard to the directions of the will and the true intent and meaning of the testator to be derived primarily from the will itself, and, if the same is not contrary to some positive rule of law or against public policy to give it effect just as written.—*Tuckerman v. Currier*, 54 Colo. 25, Ann. Cas. 1914C, 599, 129 Pac. 214. In construing a will the several clauses must, if possible, be made to harmonize, and effect must be given the intention of the testator as enunciated in the instrument.—*Beakey v. Knutson*, 90 Or. 574, 174 Pac. 1149, 177 Pac. 955. In the case of an instrument having a testamentary aspect, the legal character to be given to it depends on the time at which the maker intends that ownership or interest thereunder shall pass, whether that of his executing the paper or that of his death; such intention to be drawn wholly from the contents and the circumstances attending the execution.—*Taylor v. Wilder* (Colo.), 165 Pac.

766. The testator's intention is to be gathered from all parts of the will, as well as the circumstances surrounding the testator at the time of its execution.—*Morse v. Henlon*, 97 Kan. 399, 155 Pac. 800. A court is bound to give to a will that construction which will effectuate the testator's intention, if this can be gathered from the terms of the will itself, taking all its contents into consideration.—*In re Peters' Estate*, *Nuhse v. Peterson*, 101 Wash. 572, 172 Pac. 870. The testator's intention must be gathered from the language of the will, construing all the provisions together.—*In re Peters' Estate*, *Nuhse v. Peterson*, 101 Wash. 572, 172 Pac. 870. The primary purpose of all interpretations of wills is to ascertain the testator's intent, as disclosed by the language he has used. Each case depends upon its own peculiar facts, and precedents have comparatively little value.—*Estate of Henderson*, 161 Cal. 354, 119 Pac. 496. Always must the intent of the testator be determined by the will itself, and that determination is a conclusion of law.—*Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 168. The cardinal rule of construction of a will is to ascertain the testator's intent, which is to be ascertained from a full view of everything within the four corners of the instrument.—*Jones v. Broadbent*, 21 Ida. 535, 123 Pac. 477. The intention which controls in the construction of a will is that which is manifest, either expressly or by necessary implication, from the language of the will as viewed, in case of ambiguity, in the light of the situation of the testator and the circumstances surrounding him at the time it was executed.—*Maling v. Maling* (Or.), 217 Fed. 127, 130. If in an attempted description of land devised the testator has used the word "northeast," when, as a fact, he held no land so described, whereas by substituting the word "southeast" for "northeast" the language would describe land he actually held, the substitution should be made in construing the will.—*In re Peters' Estate*, *Nuhse v. Peterson*, 101 Wash. 572, 172 Cal. 870. The intention of the testator may appear even when the scrivener may break the statement of the gift into parts, if these parts are so related to each other, and so obviously united in the expression of a common purpose that they must be given a meaning such as they would have if embraced in a single sentence or clause.—*Morse v. Henlon*, 97 Kan. 399, 155 Pac. 800. Beneficiaries under a will, described in the instrument as "my six (second) cousins named Moran and all living in Ireland, I believe," may validly be identified by parol evidence when there are rival claimants to whom the description might possibly apply.—*In re Moran's Estate*, 95 Wash. 428, 163 Pac. 922. The cardinal rule for construing and interpreting wills is to ascertain the intention of the testator, such intention to be found from the language of the will and the entire context thereof, and not from isolated provisions or expressions.—*Lucas v. Scott* (Haw.), 239 Fed. 450, 453. Courts are not permitted to make wills for testators who have failed to make express disposition of their properties, and in seeking the intention of a testator they may resort only to his will; hence, if a will is clearly expressed and is

unambiguous, but describes for disposition property the testator did not own, a court is not authorized to consider extrinsic evidence and decide therefrom what other property the testator had in mind.—In re Kahoutek's Estate, *Kahoutek v. Kahoutek* (N. D.), 166 N. W. 816.

(3) **Liberal construction.**—In the interpretation of the language of a will a liberal construction is to be applied in order to determine the testator's intention so as not to defeat the purpose of his bounty.—*Kerr v. Duvall*, 62 Or. 470, 125 Pac. 831. It is the duty of the court where possible, to find a meaning for and to give effect to the language used to express the intention of the testator; and, in construing a will written in the Hawaiian language, a Hawaiian court will take a broad view.—*Magoon v. Kapiolani Estate*, 22 Haw. 510, 513. In the interpretation of a will, its language must be liberally construed with a view to carrying into effect what the will as a whole shows was the real intent of the testator; this intent, however, must be found in the language used in the will taking into view, in cases of uncertainty arising upon its face, the circumstances under which it was made.—In re Hoytema's Estate (Cal.), 181 Pac. 645, 646.

(4) **Wisdom, justice, propriety, or legality of will.**—A jury is not authorized to overturn a will merely because its disposition does not conform to the jurors' notions of justice or propriety.—In re Packer's Estate, 164 Cal. 525, 129 Pac. 778, 779. It is not proper to substitute the will and judgment of the jury for that of the father in making provision for a son's education and support during minority even though that of the former may be wiser than that of the father.—*Anderson v. Anderson*, 43 Utah 26, 134 Pac. 558. Where a testator gave his estate to a nephew and another who had been raised in his family as a son, to the exclusion of other nephews, it can not be said that such will is unjust, where such beneficiaries were the only intimate associates of testator and had always assisted him in the management of his business, and the contestants lived at a distance from and were not intimate with the testator.—In re Packer's Estate, 164 Cal. 525, 129 Pac. 778, 780. Where the intent is plain, the duty of the court is to declare that intent, without regard to the consequences. If the plan adopted by the testator for the disposition of his property can not be given effect because it violates the rules of law, the court is not authorized to substitute for the illegal provision some other which it may suppose would have been adopted by him if he had known that the directions actually given could not be carried out.—*Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371.

(5) **Aids to interpretation.**—There is no occasion for employing rules for the judicial construction of a will, in search of the testator's intention, where such intention is expressed clearly and unequivocally in the instrument.—*Morse v. Henlon*, 97 Kan. 399, 155 Pac. 800; *Banks v. Watkins* (Kan.), 181 Pac. 608, 609. The primary purpose of all rules to be applied in the construction of wills is to ascertain the

testator's intention, not some undeclared purpose which may be imagined to have been in his mind, but the intention disclosed by the words he has used. As an aid to the interpretation resort may be had to the circumstances under which the instrument was executed.—Estate of Spreckels, 162 Cal. 559, 123 Pac. 371. Intent where not sufficiently clear may be ascertained from circumstances surrounding making of will.—Civil Code, section 1318.—In re Murphy's Estate, 157 Cal. 63, 137 Am. St. Rep. 110, 106 Pac. 230. While the intention of a testator must appear from a perusal of the will, although not articulated in formal language, and such intention can not be drawn by inference from mere silence, or from bare conjecture, or from speculation, the court may take into consideration the subject-matter, the chief aim of the testator and all the surrounding circumstances in giving effect to such intention.—In re Hartung's Estate, 40 Nev. 262, 161 Pac. 715, 716. Rules must give way to manifest intent.—In re Murphy's Estate, 157 Cal. 63, 137 Am. St. Rep. 110, 106 Pac. 230. The intention of a testator is to be ascertained from the language of the will and where the meaning is clear from the words used, a resort to rules of construction is not permissible, but where the meaning of a word or phrase is not clear and may be given one of either two or more meanings when read in the light of the whole instrument, the courts are required to look to the conditions and circumstances surrounding the testator at the time the will was made and in the light of the same his true intention.—In re Pappleton's Estate, 34 Utah 285, 131 Am. St. Rep. 842, 97 Pac. 141. The primary purpose of all rules to be applied in the construction of wills is to ascertain the testator's intention, not some undeclared purpose which may be imagined to have been in his mind, but the intention disclosed by the words he has used. As an aid to the interpretation, resort may be had, in cases of uncertainty, to the circumstances under which the instrument was executed.—Estate of Spreckels, 162 Cal. 559, 123 Pac. 371. The rule expressed in section 1320, Civil Code of California, as to the construction of testamentary expressions, like any other rule of construction, is but a guide of ascertaining the testator's intention, and is not to be used to inject into the later instrument terms and provisions not found in it, unless by express reference in the later instrument or by necessary implication it appears that such was the testator's intention.—In re Bergland's Estate, — (Cal.) —, 182 Pac. 277, 278. It is always the testator's intention as fairly ascertained and expressed that must govern in the construction of testamentary instruments, and the rules of construction contained in that section, with all other rules are subordinated to such object.—In re Bergland's Estate, — (Cal.) —, 182 Pac. 277, 278. The cardinal rule to be applied in the construction of a will is to gather the intent of the testator from the language of the will and this intent is to be ascertained from a full view of everything within the "four corners of the instrument," but this rule must be applied in connection with that other rule to the

effect that a clearly expressed intention in one portion of the will is not to yield to a doubtfully expressed intention in another portion.—*Wilson v. Linder*, 18 Ida. 438, 138 Am. St. Rep. 213, 110 Pac. 274. A will should be construed so as to give effect to the desire and intention of the testator in so far as is possible to do so from the language used; and in placing a construction on the will, the courts will avoid and prevent intestacy, if reasonably possible without doing violence to the evident intent of the instrument. In looking for this intent, not only the language used but the entire purpose and scheme of the instrument must be given effect and regard must be had not only to the property disposed of, but to the surroundings, the persons named as devisees or legatees, and their relation to the testator, and what the testator evidently had in mind in employing the language used.—*In re Lotzgesell's Estate*, 62 Wash. 352, 113 Pac. 1107. In the construction of wills, the intention of the testator governs, and rules for determining the intention are but advisory and not controlling.—*Bacon v. Nichols*, 47 Colo. 31, 105 Pac. 1083. Section 2767, Comp. Laws of Utah, of 1907, providing that a will is to be construed according to the intention of the testator controls all other provisions in which rules of construction are given, in that no rule is to be given effect except to ascertain the real intention of the testator as expressed by him, and rules of construction are to be resorted to as mere aids for the purpose of ascertaining the real intention of the testator.—*In re Pappleton's Estate*, 34 Utah 285, 131 Am. St. Rep. 842, 97 Pac. 140. All other rules for the interpretation of wills are subordinate to the rule that the intention of the testator, as gathered from all parts of the will, is to be given effect, and that doubtful or inaccurate expressions in the will shall not override the obvious intention of the testator.—*In re Brown's Estate*, *Brown v. Brown*, 101 Kan. 335, 339, 166 Pac. 499. In dealing with wills, the function of the court is to ascertain, if possible, and to give effect to the intent of the testator as he expressed it in the instrument, if such intent be not unlawful; and, in the case of a latent ambiguity, or of uncertainty or incompleteness of expression, the court will accept the aid of circumstances so as to be placed as nearly as possible in the position of the testator as of the time.—*Mercer v. Kirkpatrick*, 22 Haw. 644, 647. In interpreting a will the court may take into consideration the subject-matter, the chief aim of the testator, and all the surrounding circumstances.—*In re Hartung*, 40 Nev. 262, 277, 160 Pac. 782, 161 Pac. 715. In a contest over the probate of a will, its construction is not before the court and can not be determined, yet the court can examine the contents of a will as an incident where it would aid in determining the validity of its execution.—*Bell v. Davis*, 55 Okla. 121, 155 Pac. 1132, 1135. In the examination of a manuscript in order to ascertain the intention of a party courts will take into consideration the ability of the person who drew the instrument, correctly to express the terms, objects, and purposes desired.—*Love v. Walker*, 59 Or. 95, 115 Pac. 300. The sole aim

of the court in construing a will is to give effect to what the testator intended; and the purpose of rules of construction is merely to aid the court in pursuing this aim.—In re Estate of Gray, 27 N. D. 417, 424, 146 N. W. 722.

(6) **Extrinsic evidence to explain.**—Parol evidence is admissible to explain a latent ambiguity in a will, as in other writings. If the person to take is not, in some way, described in the devise, evidence will not be admitted to show who was intended; but where there are words of designation, though the true identity of the devisee is not certain through a mistake of the name, the ambiguity may be removed by evidence dehors the will. This is a well-settled rule in respect to devises in general, and it is peculiarly applicable to charitable bequests made to religious corporations.—*Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502, 504. Where extrinsic evidence is admitted to explain a latent ambiguity, and to perfect an imperfect description of beneficiaries, or the subject-matter of devises, or bequests, no evidence is admissible to change or vary the testator's express intent. This must always be deduced from the will itself, assisted by such extrinsic evidence.—*Estate of Dominici*, 151 Cal. 181; 90 Pac. 448, 450; *Estate of Young*, 123 Cal. 337, 55 Pac. 1011. Where a latent ambiguity in the will is established by parol testimony, and the same testimony explains and removes the ambiguity, the language of the instrument will control.—*Modern Woodmen etc. v. Puckett*, 77 Kan. 284, 17 L. R. A. (N. S.) 1083, 94 Pac. 132, 135. Where a testator conveys a life interest in lands north of a township line described as that portion in township 16, parol evidence is not admissible to prove that the testator intended to devise, by the same description, that portion of the land situated "south" of the township line, or that part which was in another township.—*Taylor v. Horst*, 23 Wash. 466, 63 Pac. 231, 232. The rule excluding oral proof, in explanation of a written instrument, applies to the language of the instrument, and not to its import or construction.—*Moreland v. Brady*, 8 Or. 303, 312, 34 Am. Rep. 581. Where a testator, in his will, bequeaths to his son all of his property, real, personal, or mixed, and follows with the clause, "that is to say, an undivided one-half interest in said property, or all of which I have power, under the law, to make testamentary disposition, leaving the remaining undivided one-half of said community property to my said wife as the law directs," the wife's half of the property is not disposed of by the will, and should, in the event of her death before that of the testator, go to the heirs as the law directs.—*Estate of Williamson*, 75 Cal. 317, 17 Pac. 221, 222. The intention of a testator is to be ascertained from the language of the will and codicil construed together. If the intention expressed in these instruments is clear, transposition of words will not be resorted to.—*Adair v. Adair*, 11 N. D. 175, 90 N. W. 804. It is fundamental that in all cases where extrinsic evidence is admissible to aid in expounding the will, the evidence is limited to this single purpose. It is considered for the

purpose of explaining and interpreting the language of the will, and is never permitted to show a different object from that disclosed, though, perhaps, obscurely, by the language of the will itself.—*Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 168. Parol testimony is admissible, in proceedings for the distribution of an estate, to explain a latent ambiguity in a will, as where its terms fit different persons in different degrees of relationship to the testator.—*In re Moran's Estate*, *Hynes v. Moran*, 95 Wash. 428, 163 Pac. 924. Parol evidence is admissible to identify land devised by ascertaining to what tract the description will apply.—*Cummins v. Riordon*, 84 Kan. 791, 115 Pac. 568. In order to determine a testator's intention testimony is admissible to explain the situation and condition of the property as understood by him when he attempted to make a disposition thereof.—*Kerr v. Duvall*, 62 Or. 470, 125 Pac. 831. The court has no power to reform a will so as to conform to the intentions of the testator shown by external evidence to be different from those expressed in the instrument.—*Holmes v. Campbell College*, 87 Kan. 597, Ann. Cas. 1914A, 475, 125 Pac. 25. The general rule is that parol evidence can not be admitted to supply, or contradict, enlarge, or vary the words of a will, nor to explain the intention of the testator, except in two specified cases: (1) Where there is a latent ambiguity, arising de hors the will as to the person or subject meant to be described, and (2) to rebut a resulting trust.—*Siegley v. Simpson*, 73 Wash. 69, Ann. Cas. 1915B, 63, 47 L. R. A. (N. S.) 514, 131 Pac. 481. In those cases where extrinsic evidence is permissible there may be a conflict in the extrinsic evidence itself, in which case the determination of that conflict results in a finding of pure fact. But when the facts are thus found, those facts do not solve the difficulty. They still are to be applied to the written direction of the will for the latter's construction, and that construction still remains a construction at law. In such cases, where the evidence of the facts is in conflict, it is permissible for the court, or for the jury, to find the facts; and those findings, under firmly established principles, will not here be disturbed. But the application to the will itself of the facts found, admitted, or established without conflict presents a question of legal construction, which is as purely a question of law as is a construction of the will without resort to extrinsic evidence. Therefore, if the facts have been found by the court upon conflicting evidence, this court, accepting the findings, will still review the construction of the court in probate and determine whether or not a wrong construction at law has been reached.—*Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 168. The person or thing which is the matter in doubt being decided upon as a matter of fact, the application of the intent of the will that that person should receive the property, or that the property should go to such a person, presents absolutely no difficulty. For that reason, as has been said, the fact that there still remains to the court the duty of construing the will in this particular is sometimes lost sight of. Thus a will gives a legacy "to my niece, daughter of my sister Jane, in San Francisco."

It is disclosed that the testator has a sister Jane, who lives in San Francisco, and who had two nieces. Extrinsic evidence is admitted to show that at the time of the making of the will the sister Jane had but one daughter; that the testator knew this niece; that before the birth of the second niece he departed from the state, was never thereafter in communication with his sister, and did not know of the existence of the second niece. Here the finding of fact would clearly be that the testator had in mind the elder niece. This finding at once removes the only difficulty in the way of construction; but, nevertheless, legally and logically, no matter how simple may be the construction which follows, there is the necessity of construction in the declaration by the court that the testator by his will did bequeath a legacy to the elder niece. Much more apparent is this legal construction in the second class of cases.—*Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 168.

REFERENCES.

Mistakes and omissions in the will.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1340. Parol and extrinsic evidence to aid in the construction of wills.—See notes 6 L. R. A. 321-324; 4 Prob. Rep. Ann. 467-476. Intention of testator, ascertainment of, where will is uncertain.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1318.

3. Law in force.—A devise of real property is governed by the law of its situs.—In *re Stewart's Estate*, 26 Wash. 32, 66 Pac. 148. The provisions of a will, relating to personal property situate in this state, must be construed according to the law of the domicile of the testator at the time of his death.—*Crandell v. Barker*, 8 N. D. 263, 78 N. W. 347; *Knox v. Barker*, 8 N. D. 272, 78 N. W. 352. In construing a will disposing of personalty, the law of the testator's domicile controls, unless it contravenes the law of the state when the will is offered for probate.—In *re Campbell's Estate (Utah)*, 173 Pac. 688. The rule that the disposition of personal property is governed by the law of the domicile of the owner is applicable only when there is no law to the contrary in the place where the property is situated.—*Estate of Lathrop*, 165 Cal. 243, 131 Pac. 752. The validity of a will is ordinarily to be determined by the laws of the domicile of the testator.—*Hollister v. Hollister*, 85 Or. 316, 166 Pac. 940. The construction and effect of a devise of real property situated in a jurisdiction other than that of a testator's domicile is to be determined in accordance with the law of the jurisdiction where the land is situated.—*Spreckels v. Spreckels*, 21 Haw. 556. Property in Kansas left by a testator, is subject to the provisions of the will as construed under the laws of Kansas, regardless of the domicile of the testator.—*Martin v. Martin*, 93 Kan. 714, 145 Pac. 565. Where a trust to convey real estate created by will is valid according to the law of Hawaii and is operative as to real estate situated in Hawaii, it will not be held ineffective or void so as to cause the property to pass as intestate estate upon the ground that such a trust is not permitted by the law of California,

in which state the testator resided and wherein the bulk of his property was situated. In Hawaii such a trust will operate according to the intention of the testator notwithstanding the construction placed upon the will by the California court.—*Spreckels v. Spreckels*, 21 Haw. 556. Inasmuch as, by the laws of New York, a power contained in a will of real estate may be executed by the residuary clause of the donee's will, it is to be assumed that the same rule applies in that state to a will of personal property.—*Hollister v. Hollister*, 85 Or. 316, 166 Pac. 940. A will is governed by the law as it exists at the time of the death of its maker and not by the law as it existed at the time of its execution.—*Brock v. Keifer*, 59 Okla. 5, 157 Pac. 88, 91. A will is ambulatory during the life of its maker; it is, in effect, reiterated as his testament at each moment of his life after its execution, including the last moment, and is governed by the law existing at the time it takes effect, which is at the time of the testator's death.—*Wilson v. Greer*, 50 Okla. 387, 151 Pac. 629. A will must be construed by the laws as they exist at the time of the death of the testator, not by the laws in force at the time of the execution of the will; this applies to a will executed by a Chickasaw freedwoman, who made a legal devise of her property, including her allotment.—*Barber v. Brown*, 55 Okla. 197, 154 Pac. 1156. A will is said to be ambulatory until the death of the testator, and until that event occurs the testamentary disposition is subject to the will of the testator, and likewise to the will of the state as expressed in its public laws. The will speaks as of the date of the testator's death and must conform to the laws in force at that time. While the legislature may not interfere with or divest estates which have already become vested through the death of the testator, its power over wills, the manner of their execution, and the mode of carrying out their provisions is absolute and supreme until death occurs.—*Strand v. Stewart*, 51 Wash. 685, 99 Pac. 1029. A statute passed after the making of a will, but before the death of the testator, by which the law in force when the will was made is changed, will operate on the will; such interpretation does not, however, make the statute retrospective; no vested rights are affected.—*Willson v. Greer*, 50 Okla. 387, 151 Pac. 629; *Barber v. Brown*, 55 Okla. 197, 154 Pac. 1156. In the absence of any question of a violation of the federal constitution or of a federal statute, and in the absence of any question of commercial law, wills must be interpreted in accordance with the law of the state in which they were made, as it is evidenced by its statutes and the rules of interpretation of those statutes and of wills which have been adopted by the highest judicial tribunal of the state.—*Wells v. Brown* (Okla.), 255 Fed. 852, 853. If a full-blood Indian dies after the passage of the act of congress of April 26, 1906, leaving all his property to his wife, leaving no parent or children, but leaving a grandchild, who is not an enrolled Creek citizen, the proviso of that act does not apply, and the will need not be acknowledged as required by such proviso; in

such a case, the act of congress governs, not the Arkansas law in regard to wills.—*Wilson v. Greer*, 50 Okla. 387, 151 Pac. 629.

4. Words and provisions to be given effect, if possible.—All of the will must, if possible, be given effect. And where a codicil is made, the codicil must be read into the will and as a part of it.—*Estate of Koch*, 8 Cal. App. 90, 96 Pac. 100, 101. In construing a will, the whole of its contents should be considered, and effect given to every part, if consistent with a general purpose apparent from the entire instrument.—*Bryant v. Flanner*, 99 Kan. 472, 162 Pac. 280. Where there is a consistent purpose discoverable from the will, as a whole, which will give effect to all the various parts, a single expression employed in the instrument will not be allowed to dominate.—*Bryant v. Flanner*, 99 Kan. 472, 162 Pac. 280. Where a will as construed one way makes a bequest from the income of a fund, while, as construed another, the fund itself is bequeathed, that construction should be given that would seem most apt for the accomplishment of the end the testator had in view.—*In re Hartung's Estate*, 39 Nev. 200, 211, 155 Pac. 353. If a will discloses a strong desire entertained by a testator that an enduring monument be established to the memory of his son, and a bequest, as construed one way will tend to carry out that desire, while as construed another way it will not, the bequest should be given the first construction.—*In re Hartung's Estate*, 39 Nev. 200, 208, 155 Pac. 353. A devise to a beneficial order on condition it shall erect a home for orphans "worthy of its name," calls for the erection of a structure worthy the name of orphans' home taking into consideration the strength of the order in the state, the population of the state, and the general conditions of the state.—*In re Hartung*, 40 Nev. 262, 270, 160 Pac. 782, 161 Pac. 715. A will bequeathing a residue conditionally upon the beneficiary's building an orphans' home in memory of the testator's son, the building to be worthy of the name, requires the beneficiary to maintain the home in order to continue to enjoy the bequest.—*In re Hartung*, 40 Nev. 262, 279, 160 Pac. 782, 161 Pac. 715. In ascertaining the meaning of any portion of a will, the instrument should be considered as a whole and effect be given to all of it, if possible.—*Collar v. Gaarn* (Colo.), 171 Pac. 63. Although ordinarily the statement of acreage is the least important part of a description of land, it may be controlling when it obviously was the intention of the testator that a specified quantity of land should be devised.—*Cummins v. Riordon*, 84 Kan. 791, 115 Pac. 568. All parts of the will should be effectuated and harmonized if possible.—*In re Robinson's Estate*, 159 Cal. 608, 115 Pac. 49. The estate of a deceased person is not a person or entity which can take under a will.—*Estate of Glass*, 164 Cal. 765, 130 Pac. 868. A bequest of the residue of the property of the testatrix to "father Glass' estate," the person whose estate was indicated being alive at the date of the will but having predeceased the testatrix, can not be construed as a bequest to such person if alive, and if not, to his legal heirs, or his devisees or legatees as the case may be.—*Estate of Glass*, 164 Cal.

705. 130 Pac. 868. Where a will is not effective to dispose of any of the property of the testator, his separate property would have to be regarded and treated by the courts as such, notwithstanding a declaration in the will of the wish of the testator that it should be treated and considered as community property.—*Estate of Claiborne*, 158 Cal. 646, 112 Pac. 278. If, under the terms of a will, the property is to be held by the widow so long as she lives or remains a widow, but on her remarriage is to be divided between the testator's son and stepson, who are, nevertheless, to pay out of it fifty dollars to another son for his share, an intention of the testator is thereby shown that fifty dollars is all he intended that this last mentioned son was to have out of the estate.—*In re Greenwood's Estate*, *Greenwood v. Greenwood* (Colo.), 167 Pac. 1179.

REFERENCES.

The words of a will are to be given effect rather than in interpretation rendering them inoperative.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1325.

5. Meaning of certain words.

(1) *Bequeath and devise*.—The word "bequeath" is one generally used to express a gift of personalty made in a last will or testament, while the word "devise" is a term used in such an instrument to express a gift of realty; and these words will not be used interchangeably unless such use is justified by the statute.—*Lewis' Estate*, *In re*, 39 Nev. 445, 4 A. L. R. 241, 159 Pac. 961, 963. The use of the words "devise" and "bequeath" by a testator as though unaware of there being a technical distinction between them should be adopted by the court construing the will.—*Rumel v. Soloman* (Utah), 180 Pac. 419. In the statute whereby a childless married person may by will "devise" half of his or her property to persons other than the wife or husband the word *devise* is to be taken as having the sense also of "bequeath."—*Breen v. Davies*, 94 Kan. 474, 146 Pac. 1147.

(2) *By right of representation*.—Where, under the express provisions of a will, persons are to take "by right of representation," the meaning is that descendants of a deceased heir of the testator shall, together, take the same share of the estate that their parents would have taken if living.—*Estate of Healy*, 176 Cal. 244, 168 Pac. 124.

(3) *Children*.—The word "children" does not ordinarily include grandchildren, and a devise or bequest to "The children of my deceased half-brother" is to be construed accordingly.—*In re Hutton's Estate* (Wash.), 180 Pac. 582. The word "children" is generally construed, according to its popular signification, as designating immediate offspring and not grandchildren.—*Estate of Hartwell*, 23 Haw. 213, 215. The word "children," in a will, includes grandchildren in only two classes of cases: 1; when an ambiguity in the will leaves the testator's meaning uncertain in respect to the word "children," and 2; where there is a latent ambiguity.—*Estate of Willson*, 171 Cal. 449, 153

Pac. 927. Cases where an ambiguity in a will leaves it uncertain what meaning the testator attached to "children" in using the word, so that extrinsic evidence is admissible to explain what he meant, includes only cases where the ambiguity is raised by something in the context or in the disposing clause.—Estate of Willson, 171 Cal. 449, 153 Pac. 927. Where the will purports to make a gift to "children," and it appears that none were living at the time of the execution of the instrument or afterward, extrinsic evidence may be given tending to prove that a gift to grandchildren was intended.—Estate of Willson, 171 Cal. 449, 153 Pac. 927. A testator gave his residuary estate "in equal shares to all my children who shall be living at my decease." Held, that the term children must be construed in its proper sense as designating immediate offspring, and this construction is not affected by the fact that at the time of making the will and at his death, there was living a grandchild, son of a deceased daughter, who, but for the will, would have been entitled as heir at law to a share of the estate of his grandfather.—Estate of Hartwell, 23 Haw. 213, 219. A will whereby the testator provides that his real estate shall "descend to" his "children and their bodily heirs," is not to be held as creating an estate tail, if, by reference to other parts of the instrument a different intention can be inferred.—Bryant v. Flanner, 99 Kan. 472, 162 Pac. 280. A will devised a life estate in land to a woman, with remainder to her children, born and unborn, and provided that in case she should attempt to sell or encumber any of the land "such lands shall become at once absolutely the property in fee, share and share alike, of" her "children." The woman by deed conveyed her life estate to all her children. The court holds that by reason of her conveying and of the forfeiture provision in the will "whatever future interest or contingent remainder existed in favor of unborn children was immediately destroyed."—Hall v. Brittain, 171 Cal. 424, 153 Pac. 906. The declaration by a testator, in his will, that he has never been married and has no children, but that if heirship can be proved by any one not provided for in the will he is to be given five dollars, is not to be construed as meaning that the testator has children, notwithstanding the declaration, and that they are not provided for.—In re McNear's Estate (Cal.), 180 Pac. 535.

(4) **Creditors.**—A will is not a conveyance or an alienation of the real estate described therein; "creditors," as the expression is used in the Kansas statute, concerning wills, means and includes general creditors.—Postlethwaite v. Edson, 102 Kan. 619, 171 Pac. 769, 774.

(5) **Devise, devisee, and distributive share.**—Under the statute of Nevada, the words "devise" and "devisee" are not to be given the scope of "legacy" and "legatee," and do not comprehend the disposition of personal property; so that where a will gave and bequeathed the residue of all the property of testatrix to a relative and her daughter and the mother predeceased the testatrix, the latter took under section 6219, Revised Laws, all the realty, but took only the

molety of the personalty bequeathed to her directly.—*In re Lewis' Estate*, 39 Nev. 445, 4 A. L. R. 241, 159 Pac. 961, 962. "Distributive share" held not used as words of devise so as to show a present vested gift but merely to denote quantum beneficiary was to take if she took at all.—*In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287.

(6) **Divide.**—The word "divide," in and of itself, does not import an actual physical segregation into distinct shares. It is, when used in such phrases as "to be divided between," or "divided in equal shares among," or the like, very commonly used to express an intention to give interests to persons as tenants in common. So, also, such phrases as "equal parts," or "equal third parts," or "third parts," are entirely appropriate to indicate a tenancy in common.—*Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371. The direction in said will to the trustees to "divide said estate into three equal parts" does not require them, as a condition to the vesting of the devises in the respective devisees, either to physically subdivide the various parcels of realty owned by the testator, or to appraise the entire estate, real and personal, and allot various parts of it so as to make three shares of substantially equal value; on the contrary, and especially in view of the fact that the entire estate was community property, an undivided half of which passed to the surviving wife, so that such a physical division or allotment would be impracticable, the direction for a division into three equal parts should be construed as intended to accomplish merely a creation of equal one-third interests in the entire estate and every part thereof—that is to say, tenancies in common—for his two sons and daughter, at the same moment of time, that is, upon the death of his wife.—*Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371. The direction to the trustees to divide the estate into interests held in common, and to assign, transfer, set over, and deliver, imposed upon them merely the obligation which would rest upon any trustee, at the termination of his trust, with respect to property which then passed in undivided interests to two or more persons. It would be his duty to deliver such property to the parties entitled, and to that end to make such division as is involved in the act of turning over an undivided share. Such duties being implied, they may be conferred by the testator without violation of the provisions of section 847 and 857 of the Civil Code of California.—*Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371. Wills by husband and wife, executed at the same time and containing identical terms of disposition except that each testator names the other as the first taker of his or her estate, impose upon such first taker an obligation to divide the estate, at his or her death, in accordance with the subsequent provisions of the instruments.—*Stevens v. Myers*, 91 Or. 114, 177 Pac. 37.

(7) **Estate.**—The word "estate" is used in various senses, and one of its most common uses is to denote and describe in the most general manner the property composing the assets of a decedent.—*Estate of O'Gorman*, 161 Cal. 654, 120 Pac. 33.

(8) **Hawaiian "no."**—The Hawaiian word "no," meaning "to" or "for," has always been regarded as operative and sufficient to constitute a bequest or devise when used in a will.—*Magoon v. Kapiolani Estate*, 22 Haw. 510, 513.

(9) **Income, or rents, issues, and profits.**—A gift of the income or the rents, issues, and profits of property is to be construed as a gift of the property itself unless from some language in the will it appears that the testator intended something different.—*Hapai v. Brown*, 21 Haw. 499; *King v. Hawaiian Trust Co. Ltd.*, 21 Haw. 619.

(10) **Issue.**—In its legal sense as used in statutes and wills and deeds and other instruments "issue" means descendants, lineal descendants, offspring.—*Schafer v. Ballou*, 35 Okla. 169, 128 Pac. 498. Where one died who had been twice married, leaving a widow, a child by the first marriage, and an estate the greater portion of which had been acquired by the joint industry of the decedent and the second wife, the child by the first wife is "issue" within the meaning of the word as used in the second proviso of section 8985, Comp. Laws of 1909 of Oklahoma, so as to make such child coheir with its stepmother.—*Schafer v. Ballou*, 35 Okla. 169, 128 Pac. 498.

(11) **Leave.**—The use of the word "leave," in an instrument offered for probate as a will, is sufficient evidence of testamentary intent.—*Estate of Silva*, 169 Cal. 116, 145 Pac. 1015.

(12) **Limited.**—The word "limited" when used with reference to the creation of an estate in real property means "defined."—*Kinney v. Oahu Sugar Co.*, 23 Haw. 747, 753.

(13) **Marrying again.**—Testator devised real estate to his wife and gave to another woman named other described real estate, to be held by her for the support of herself and testator's children by her, and provided that in the event of her "marrying again" the gift to her should become void, and the property should go to such children. A provision in similar language was made in favor of a third woman. The woman so named was testator's polygamous wife. Testator and she were members of the Mormon Church and believed in its doctrines including the doctrine of polygamy. Held that the words "marrying again" included the entering into a polygamous marriage, and the gift to such woman was within Comp. Laws of Utah, of 1907, section 2795, providing that a conditional disposition is one which depends upon the occurrence of some uncertain event by which it is either to take effect or be defeated, and on her entering into a polygamous marriage the gift to her terminated.—*In re Pappleton's Estate*, 34 Utah 285, 131 Am. St. Rep. 842, 97 Pac. 141.

(14) **Near.**—A devise requiring an orphan's home to be built by the beneficiary "near" a locality is satisfied if the structure is erected inside of such locality.—*In re Hartung*, 40 Nev. 262, 160 Pac. 782, 161 Pac. 715.

(15) **Residue.**—The “residue” is what remains after paying the legacies of the will and the debts and expenses of administration.—*McDougald v. Low*, 164 Cal. 107, 127 Pac. 1027, 1028. If it is manifest, from the context, or from the provisions of the will, that the testator used the word “residue” in a restricted sense, it will be given the meaning in which it is clear that the testator used it.—*Estate of Koch*, 8 Cal. App. 90, 96 Pac. 100, 101.

(16) **Share and share alike.**—The phrase “share and share alike” in a will ordinarily imports an equal division in severalty.—*Lidgate v. Danford*, 23 Haw. 317, 325.

(17) **Testament.**—“Testament” in provision against contest held to include codicil.—*In re Hite's Estate*, 155 Cal. 436, 17 Ann. Cas. 993, 21 L. R. A. (N. S.) 953, 101 Pac. 443.

(18) **Will.**—A “will” in the ordinary conception of the term as applied to a testament is the formal instrument by which a person disposes of his property to take effect at his death.—*In re Pierce's Estate*, 63 Wash. 437, 115 Pac. 837.

(19) **Technical words.**—The words of a will are to be taken in their ordinary sense unless a clear intention to use them in some other sense appears. Even technical words are not to be taken in their technical sense if the context clearly indicates a contrary intention.—*Estate of Rach*, 159 Cal. 260, 113 Pac. 373. The presumption is that technical words in a will are used in their technical sense, and they will be so construed unless the context shows a clear intent to the contrary, when their technical meaning will be subordinated to the real intent of the testator.—*Kinney v. Oahu Sugar Co.*, 23 Haw. 747, 753. While technical words in a will are ordinarily to be taken in their technical sense, they will not be so taken when it appears that they were used in another sense by a testator who drew his will without an acquaintance with the technical sense.—*Estate of Henderson*, 161 Cal. 354, 119 Pac. 496. Comp. Laws of Utah, of 1907, section 2777, providing that technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, is but declaratory of the rule prevailing at common law and is a rule of construction merely.—*In re Pappleton's Estate*, 34 Utah 285, 131 Am. St. Rep. 842, 97 Pac. 140. The phrase “heirs of the body” is the ordinary, proper, and technically accurate one to use in the creation of an estate in fee tail.—*Kinney v. Oahu Sugar Co.*, 23 Haw. 747, 753.

(20) **Other words and terms.**—In the Washington statute, which provides as follows: “When any estate shall be devised to any child, grandchild, or other relative of the testator, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real and personal, as such devisee would have done in case he had survived the testator”; the word ‘relative’ does not in-

clude the wife, or any other relative by affinity, but embraces only relatives by consanguinity.—*In re Renton's Estate*, 10 Wash. 533, 39 Pac. 145. Where a testator directs in his will that, in the event of one of his sons surviving the other, the surviving son shall have and receive all the property belonging to them, jointly or otherwise, and that, "in the event of" the death of each of said children, naming them, "the residue of my estate, whatever it may be, I give and bequeath to my brother"; the words "in the event of" mean that one of the children should take all the property in the event the other died before the property was exhausted, and the brother is entitled, upon the happening of the death of the children, to the residue of the unconsumed portion of the estate, as against heirs of the last surviving child.—*Woolverton v. Johnson*, 69 Kan. 708, 77 Pac. 559, 560, 562. The word "family" is not a technical word, but is of flexible meaning. It is sometimes used to include parents with their children, whether dwelling together or not. It also has a broader and secondary meaning, which includes all the offspring or decedents of a progenitor, but it is not to receive this construction unless such intention is manifested from the context.—*Estate of Bennett*, 134 Cal. 320, 66 Pac. 370, 371. The words "go to," used in a will, are usual, clear, and sufficient words of direct devise.—*Estate of Dunphy*, 147 Cal. 95, 81 Pac. 315, 317. Where an estate is given to a beneficiary, "if she remains unmarried," the word "if," in legal as in ordinary phraseology, imports a condition. Such is not a gift, in the sense of a devise or bequest, for the time during which the grantee remains unmarried.—*Estate of Alexander*, 149 Cal. 146, 9 Ann. Cas. 1141, 85 Pac. 308. The sense in which such words as "also," "besides," and "too," are used, depends largely upon the context.—*Platt v. Brannan*, 34 Colo. 125, 114 Am. St. Rep. 147, 81 Pac. 755; *Estate of Buhrmeister*, 1 Cal. App. 80, 81 Pac. 752. The primary and ordinary meaning of the terms "legal representatives," "legal personal representatives," "personal representatives," and "representatives" is executors and administrators and in the absence of anything to show a contrary intent they must be so construed.—*Murphy v. Tillson*, 64 Or. 558, 130 Pac. 638.

(21) Devise to "heirs," etc.—In determining in what particular sense the testator used the word "heirs," resort must be had to the context of the will, and the instrument, in general, and as a whole. It may appear from the context that the testator used the word "heir" or "heirs," not in a strict and primary sense, but in a limited sense, and as synonymous with the words "child" and "children."—*Coleman v. Coleman*, 69 Kan. 39, 76 Pac. 439. The words "fall to her children," in a will, create by inartistic phrase, a remainder in fee,—the word "children" being a word of purchase.—*Lohmuller v. Mosher*, 74 Kan. 751, 11 Ann. Cas. 469, 87 Pac. 1140, 1141. The words "all my heirs," are not to be taken solely as meaning those who take in case of intestacy, but must be considered in their relation to other words, and the context of the will.—*De Laurencel v. De Boom*, 67 Cal. 362,

7 Pac. 758. A devise of "all that piece and parcel of land," without the use of the word "heirs," carries the fee.—*Keanu v. Kaohi*, 14 Haw. 142, 143. At law the word "heirs," while it may include others, always includes the children of a decedent.—*Estate of Hassell*, 168 Cal. 287, 142 Pac. 838. Where there is a devise to a person not related to the testator, "and to his heirs and assigns forever," the "heirs" of this person take nothing on his dying before the testator; even though the will states that the testator has no reason to reward relations and much reason to reward the person named.—*Estate of Sessions*, 171 Cal. 346, 153 Pac. 231. A will provided that a fund should be placed in the hands of a trustee, the income to be paid to a son of the testator during his life; that on the death of the son, if he left no issue and the testator's widow was dead, the fund should go to the testator's "surviving heirs"; that if the widow were alive she should have the fund for her life and it should then go to the testator's "surviving heirs"; that if the son left issue, they should have the income for life and at their death the fund should go to the testator's "surviving heirs." Held that the will should be construed as intended to vest the title to the fund in the testator's heirs upon the death of the son, their enjoyment of it to be postponed during the life of the son's issue, and that the rule against perpetuities was not violated.—*Salisbury v. Salisbury*, 92 Kan. 644, 141 Pac. 173. Plainly, the words, "heirs of the W. family," mean that the remainder was left to those of his, the W., family, who would be his heirs in the event that he died intestate. This use of the word "heirs" is not strained, but is a common colloquial use, recognized both by lexicographers and law writers.—*In re Womersley's Estate*, 164 Cal. 85, 127 Pac. 645. By his last will J. W., deceased, devised his real property as follows: "I give and bequeath to my wife, Emily A. Womersley, all the real estate I die possessed of, wherever located, for her sole and separate use during the period of her natural life, and direct that at her death the said real property be equally divided among the heirs of the Womersley family, share and share alike, my said wife, Emily A. Womersley, to have all the income from said property during her life." There is held here no latent ambiguity to be resolved under section 1340 of the Civil Code of California. The phrase "the heirs of the W. family," used by the testator undoubtedly requires construction, but, if that phrase contains any uncertainty, it is one which arises upon the face of the will, and is to be construed by taking in view the circumstances under which the will was made, excluding the testator's oral declarations. (Civil Code, section 1318.) Those circumstances disclose that deceased was an Englishman, that he with his brothers and sisters inherited from his father, that the brothers and sisters were those above named, and in the event of his intestacy were (with his widow) his sole heirs at law. There seems to be no difficulty in arriving at the intent of the testator from the words expressed in the will.—*In re Womersley's Estate*, 164 Cal. 85, 127 Pac. 645. Legacy to M. described as niece, but who was no

blood relation of testator, residue to "my heirs at law including my niece above named, to share in this clause," held to entitle niece to share in residue as an heir though she was not such.—*In re Robinson's Estate*, 159 Cal. 608, 115 Pac. 49. Held entitled to take as if she were sole child of a deceased brother or sister.—*In re Robinson's Estate*, 159 Cal. 608, 115 Pac. 49. A will after giving a pecuniary legacy to a designated person described by the testator as "my niece," provided in the residuary clause that the residue of his estate should go "to my heirs at law as they are entitled by the laws of inheritance and succession, including my niece above named, to share in this clause." The person so designated as "my niece" was not a niece of the testator, nor one of his heirs at law, but was a niece of his deceased wife. His heirs at law were a surviving sister and the descendants of two deceased sisters and of one deceased brother. Held that the person so designated as the testator's niece was to be considered in the distribution of such residue as one of the testator's heirs at law and was entitled to a one-fifth thereof.—*Estate of Robinson*, 159 Cal. 608, 115 Pac. 49.

REFERENCES.

"Blood relations" or "blood relationship," construction of terms.—See note 5 *Am. & Eng. Ann. Cas.* 511. "Children," meaning of term.—*Estate of Wardell*, 57 Cal. 484, 491. "Children," when gift to, includes child en ventre so mere.—See note 7 *Am. & Eng. Ann. Cas.* 134. Disinheriting heirs; heirs are favored at law.—See notes 2 *L. R. A.* 848, 11 *L. R. A.* 767. "Issue" and "lawful issue," construction of terms as regards illegitimates.—See note 5 *Am. & Eng. Ann. Cas.* 936. "Survivor," when construed to mean "others."—See note 4 *Am. & Eng. Ann. Cas.* 581. Testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representatives," "personal representatives," "family," "issue," "decedents," "nearest" or "next of kin," how title vests under, and effect of.—See note *Kerr's Cal. Cyc. Civ. Code*, §§ 1334, 1335: Whether terms, "child," "children," "issue," etc., in a will include adopted children.—See note 27 *L. R. A.* (N. S.) 1158, 30 *L. R. A.* (N. S.) 914, 37 *L. R. A.* (N. S.) 849. Meaning of term "natural heirs."—See note 45 *L. R. A.* (N. S.) 1163. Effect of declaring one to be an heir or next of kin.—See note 45 *L. R. A.* (N. S.) 48. Effect of *videlicet* following words "heirs" in a devise of real property to restrict estate given to the first taker.—See note 33 *L. R. A.* (N. S.) 191. Who takes under gift to "husband," "wife," or "widow."—See note 33 *L. R. A.* (N. S.) 816.

6. Language of the will.

(1) *In general*.—The phraseology of a will, as written, is binding on the court in construing the instrument.—*In re Rounds' Estate* (Cal.), 181 Pac. 638. A rule of construction as applied to wills is that punctuation is not to be regarded if any change therein will render the meaning of the instrument more obvious.—*Holt v. Wilson*, 82 Kan. 268, 108

Pac. 87. In construing a will, inquiry should be directed to the meaning of the words employed and the intent of the testator will be derived therefrom. Such words should receive an interpretation which will give to every expression some effect rather than one which will render any of the expressions inoperative.—*Estate of Robinson*, 159 Cal. 608, 115 Pac. 49. The courts are very liberal in construing words in a will written by one unfamiliar with the English language or unused to technical terms.—*Estate of Silva*, 169 Cal. 116, 145 Pac. 1015. If, in a will, the words occur, "I am aware of any kin," when there is proof that the testator stated, on the death of a brother, that he had no relative left, the court may assume that there was an unintentional omission of "not" from the quoted expression.—*Estate of Friedman*, 178 Cal. 27, 172 Pac. 140. In construing a will, the whole instrument must be taken together, and considered so as to effect the intention of the one who executed the writing, owned the property, and had the power to dispose of it.—*Beakey v. Knutson*, 90 Or. 574, 174 Pac. 1149, 177 Pac. 955. In a will which purported to dispose of the entire estate of the testator, and which expressly gave to his wife in her own right all of his personal property, there was a separate item as follows: "I will and bequeath to Mina, my wife, all my real estate of whatever kind, lots, houses, or farm property, to have and hold, sell and convey in order to pay and liquidate indebtedness, mortgages, etc., against my estate." Held that this provision operated to devise to the wife an absolute fee in the real estate subject, of course, to the payment of the debts of the testator.—*Twist v. Twist*, 91 Kan. 803, 139 Pac. 377. The effect of the contemporaneous execution by husband and wife of separate wills, identical however in form and terms, except that each testator names the other as the first taker in the disposition of his or her estate, is the same with respect to the joint accumulations of the husband and wife as if the testators had executed a joint will.—*Stevens v. Myers*, 91 Or. 114, 177 Pac. 37. If a childless married woman has blood relations resident in Mexico, and her husband has not, a provision in her will is sufficiently specific, and will be enforced, that reads, "All that is left of my estate, after my just debts are paid, I leave to my own family who, I think are all in Mexico."—*Estate of Marshall*, 176 Cal. 784, 169 Pac. 672.

(2) *Ambiguous and doubtful words.*—When ambiguity of statement occurs, or provisions are made which are apparently contradictory or inconsistent, then it is the duty of the court, if possible, to learn the circumstances under which the will was made, and to ascertain the relations and feeling existing, at the time of the execution of the will, between the testator and the beneficiaries,—in short, to put itself in the testator's place for the purpose of determining his intention. But where the provisions of the will are unambiguous, and are consistent with each other, there is nothing left for construction or interpretation.—*Hurst v. Weaver*, 75 Kan. 758, 90 Pac. 297, 298. Where the meaning of a will is doubtful or obscure as to the testator's

children, it will be presumed that the testator intended to make equal distribution among them.—*Kinhead v. Maxwell*, 75 Kan. 50, 88 Pac. 523, 525. A specific statement as to a thing specified in a will, overcomes a general or class statement where the two can not be harmonized.—*Hurst v. Weaver*, 75 Kan. 758, 90 Pac. 297, 298. It is a fundamental and indisputable proposition that wherever doubt arises as to the meaning of a will, such doubt is resolved by construction, and that construction is of one law. It is an application of legal rules governing construction, either to the will alone or to properly admitted facts, to explain what the testator meant by the doubtful language.—*Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 168. There is no rule in the construction of wills which prefers a name to a description.—*Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 169. Where errors in description or designation are found, so that, however the will may be construed, the construction results in rejecting some part of such designation or description, the construction is one of law, because it necessarily results in striking from a written instrument some words or phrases contained therein as being erroneous and not expressing the true meaning and intent of the testator.—*Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 169. Where a person is indicated by name and description, and there is no one who answers both name and description, but there is some one who answers the name and some one who answers the description, for the purpose of ascertaining whether there is a description which is not consistent with the name, the whole will must be looked at. In these cases the person intended must be ascertained by a consideration of all the circumstances of the case. It has been said that "there are more instances in which the description prevailed than in which the name prevailed."—*Estate of Donnellan*, 164 Cal. 14, 124 Pac. 166, 169. The matter is clearly expounded in *Thebald on Wills*, page 268. He says: "Sometimes a correct name is given, coupled with an erroneous description. There is a person of that name, but no one to whom the description applies. The person of that name takes. *Veritas nominis tollit erroneam demonstrationis*." On the other hand, if there is no one who answers to the name, but there is a person who answers to the description, the latter may take. "*Nihil facit error nominis cum de corpore constat*."—*Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 169. Where a will discloses a latent ambiguity and uncertainty as to the person whom the testatrix intended to indicate, extrinsic evidence is admissible to explain same.—*Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166. The rules of construction applied to wills recognize that each will must be construed by its own terms and that where there is any ambiguity in the language the court must so far as possible put itself in the position of the testator, taking into consideration all the circumstances under which the will was executed, the condition of the testator's family and his estate, and from all the facts and circumstances find what his intention was.—*Hawkins v. Hansen*, 92 Kan. 73, L. R. A. 1915A, 90, 139 Pac. 1022. In cases involving the

construction of a will the general rule is that where the testator has expressed his intention so ambiguously as to create a difficulty which makes it necessary to go into a court of chancery to get a construction of the will, and to remove the difficulty, the costs of litigation including reasonable attorneys' fees to all necessary parties, must be borne by the estate, and the general residue is the primary fund for the payment of such costs.—In re Estate of Brown, 24 Haw. 573.

REFERENCES.

Ambiguous and doubtful expressions, explanation of by recitals in the will.—See note Kerr's Cal. Cyc. Civ. Code, § 1323. Construing parts of will in relation to each other.—See note Kerr's Cal. Cyc. Civ. Code, § 1321.

(3) *Precatory words.*—Whether, in any given case, the words of a will, precatory in form, are to be interpreted as mandatory in effect, depends upon the true intent of the testator, to be arrived at by a consideration of the context and, perhaps, of the attending circumstances. Where, for example, the testator says, "I desire they (the legatees named) pay over whatever difference there may be in the appraisal or allotment made by their mother for the benefit of my other children, said allotment to be made at the discretion of my wife"; the language of the requirement constitutes a condition precedent, and such legatees acquire title only upon making due compensation, to be determined by the method pointed out.—*Mollenkamp v. Farr*, 70 Kan. 786, 79 Pac. 646, 647. The words "I desire" that my real estate be sold, are the equivalent of the words, "I will" that it be sold. While the desire of the testator for the disposal of his estate is a mere request, when addressed to his devisee, it is to be construed as a command, when addressed to his executor.—*Estate of Pforr*, 144 Cal. 121, 128, 77 Pac. 825; citing *Estate of Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071. A desire, expressed in a will, that is addressed to a beneficiary, rather than to the executor, is to be regarded as a request only, and not a command.—*Estate of Browne*, 175 Cal. 361, 165 Pac. 960. While the desire of the testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee be construed as a limitation upon the estate or interest that he has given in absolute terms.—*Estate of Tooley*, 170 Cal. 164, Ann. Cas. 1917B, 516, 149 Pac. 574. Precatory words are not to be regarded as creating a trust unless it appears that the testator intended to impose an imperative obligation and to exclude the exercise of discretion on the part of the person to whom the recommendatory words are addressed.—*Estate of Purchell*, 164 Cal. 300, 210, 138 Pac. 704. A precatory trust is not created by a provision in a will whereby the testatrix gives the residue of her estate to P., the brother of her deceased husband, and then declares: "It has always been my desire and purpose to devote a large part of my property and estate to charitable purposes and uses, and to make such provisions therefor in my will. But under the exigencies of this will I am able to designate the

particular charities and benevolences to which I desire to extend my bounty. The said P., however, is fully aware of and understands my desires in this regard, and I have full confidence in him that he will, in his judgment, respect and endeavor to carry out my said wishes and desires. I therefore request of him to do so, so far as he may think proper, without, however, intending by this clause or anything that may be herein stated, to create any trust or to place any limitations upon the said P., residuary legatee, in respect to the said legacy."—Estate of Purchell, 164 Cal. 300, 138 Pac. 704. A separate and independent action in equity would be necessary to develop such a trust rather than an appeal from a decree of distribution.—Estate of Purchell, 164 Cal. 300, 210, 138 Pac. 704. A will is not to be construed as creating a trust by precatory words when the words used, taken in their ordinary and grammatical significance, fail to indicate that the testator intended there should be such a trust.—Garner v. Purcell, 173 Cal. 495, 160 Pac. 682. Precatory words may or may not create a trust, according as they are used and whether, in any particular will, they have been used for this purpose, will depend upon the construction to be given to that will. The question for determination is, whether the devisee or legatee is the beneficiary, or merely is trustee for others, of the gift bestowed upon him; whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of that party, leaving it, however, to the party to exercise his own discretion.—Estate of Mitchell, 160 Cal. 618, 117 Pac. 774. Precatory words are not to be regarded as creating a trust unless it appear that the testator intended to impose an imperative obligation, and to exclude the exercise of discretion by the person to whom the recommendatory words are addressed.—Estate of Browne, 175 Cal. 361, 165 Pac. 960. A testator who concludes the bequest to the residuary legatee with such words as, "except that I desire him to pay to" a designated person a named sum, does not thereby create a precatory trust.—Estate of Browne, 175 Cal. 361, 165 Pac. 960. If a testator employs language showing that he is aware of the meaning of words of testamentary disposition, and, after writing "devise" and "bequeath" in their proper connections, ends his will with the words, "It is my wish that my son Theodore shall have the privilege of keeping my farm," these words are to be deemed precatory, and not as effecting a devise.—In re Wynea's Estate, Duus v. Wynea, 40 S. D. 416, 167 N. W. 394. If by his will a man provides that his wife shall take all his property, "to be used by her for her own comfort and maintenance as she may see fit," but expresses the desire that at her death she shall dispose of "her one-third of the property" only, and that his remaining two-thirds shall descend to his heirs, the wife is not limited to her one-third in using the property "for her own comfort and maintenance as she may see fit."—In re Estate of Slocum, DuBois v. Daugherty, 96 Wash. 110, 164 Pac. 759. When a

testator says, referring to his wife who is made executrix, "I direct and request that she use such or all of the money which may be the proceeds of any property she may sell," the intention is that she shall act only in her fiduciary character and capacity.—*Beakey v. Knutson*, 90 Or. 574, 174 Pac. 1149, 177 Pac. 955.

REFERENCES.

Construing will and its codicil together.—See note 28 Am. St. Rep. 353. Effect in a will of an invalid clause upon an otherwise valid clause.—See notes 3 Ann. Cas. 950, 18 Ann. Cas. 473.

(4) **Dispositive provisions.**—A will, in its nature, is the disposition which the testator desires to have made of his estate after his death. All the expressions indicative of his wish or will are commands.—*Estate of Tooley*, 170 Cal. 164, 149 Pac. 574. Words in a will indicating the wish of the testator regarding the disposition to be made of his property by the law at his death are to be taken as a dispositive provision.—*Estate of Tooley*, 170 Cal. 164, 149 Pac. 574. If the will of a testatrix contains the following language: "Should any one to whom I have made a bequest of any portion of my Estate undertake to break my Will, I desire such person's bequest becomes void and be set aside," such language is a clear and distinct expression of the will of the testatrix that, if any legatee or devisee shall undertake to contest the will, the legacy given to such person shall be thereby forfeited; it is a dispositive clause; the word 'desire' is sufficient to declare a disposition of the property; and, the intention being clear, section 1322 of the Civil Code of California, showing how a bequest in one part of a will can not be affected by any other words in another part of the will, does not apply to such clause.—*In re Shirley's Estate* (Cal.), 181 Pac. 777, 778. If a will contains words which dispose of property, or which impose a condition upon a bequest given elsewhere in the will, they need not be addressed to any one; it is enough that they show the intent and will of the testator regarding the property or legacy; if they do this, the court and the law will carry it out by probating the will and distributing the estate as is provided therein.—*In re Shirley's Estate* (Cal.), 181 Pac. 777, 778. The will was expressed as follows: "I give all my property at my death to my daughter, Logan Mattie Tooley. If at her death she has neither husband or children I desire any property that may be left divided equally among my sisters and brother.—*Martha L. Tooley*." It was held that the second clause was mandatory as well as the first.—*Estate of Tooley*, 170 Cal. 164, 149 Pac. 574. The words, "I desire" and "I request," used by a testator, although held often to have only a precatory force, are, like other words, to be controlled by the testator's intention.—*Beakey v. Knutson*, 90 Or. 574, 174 Pac. 1149, 177 Pac. 955. Where, in a will, the language "I will and desire" is used in such a connection as to indicate that the testator intended thereby to make a disposition, and not merely to prefer a request, it should be construed as so indicated.—*Mastellar v. Atkinson*, 94 Kan. 279, Ann. Cas. 1917B, 502, 146 Pac. 367. A testator's wishes

and directions, not precatory merely, must be followed if possible in all particulars, unless some appropriate tribunal authorizes the executor to swerve aside; as, where the testator directs his executor to sell and dispose of all personal property, "particularly my sheep," and to turn over the proceeds instead of such property.—*Sakariason v. James*, 22 N. M. 437, 163 Pac. 1080.

(5) *Holographic wills*.—Where a decedent had executed a holographic will, and afterward, in a letter announcing his marriage, wrote to his attorney to the effect that he wanted to have the will changed, "so that she (his wife) will be entitled to all that belongs to her as my wife"; it was held that the decedent's intention was clear as to the disposition of his property, and as to his wife. Where the expression of the intention is clear, the intent must not be ignored because the language is not technical.—*Barney v. Hays*, 11 Mont. 571, 29 Pac. 282. A holographic codicil entirely in the handwriting of the testator, with the exception of the name of a witness and his address, is valid, where it does not appear that there was any attempt to make an attestation of the codicil, but where the name of the witness may have been placed there to supply proof of the handwriting, or proof of the fact that the codicil was holographic.—*Estate of Soher*, 78 Cal. 477, 21 Pac. 8. A holographic will examined and construed as making the husband a residuary legatee, although the name of the husband was separated, in the will, from the portion creating the bequest, by the name of the testatrix. The testimony of witnesses, as to unfriendly treatment of the testatrix by her husband, is inadmissible to authorize a conclusion that she intended to exclude him from sharing in her estate.—*Stratton's Estate v. Morgan*, 112 Cal. 513, 44 Pac. 1028, 1029. A will written and dated by the testator, using therefor the mechanism of a typewriter, does not satisfy the statutory requirements of a holographic will, even though the actual signature be by pen and ink.—*Estate of Dreyfus*, 175 Cal. 417, L. R. A. 1917F, 391, 165 Pac. 941. A writing in the form of a letter, if having in any way the semblance of a testament, must, in order to be given the character of a holographic will, in a case where there exists a previously made will unrevoked, be so phrased as to exclude all possible doubt of the intention of the testator in respect to the disposal of his estate, whether to explain or modify the old disposition or to make a fresh one.—*White v. Deering*, 38 Cal. App. 433, 177 Pac. 516. Where in a holographic will the testator, after making various gifts of both personal and real property without using the technical word "devise" or "devisee" to distinguish the gift of realty, speaks of the residue of his estate, after paying all the "bequests herein provided for," and after disposing thereof, provides that "should any of the legatees herein provided for die before my death, then the legacy provided for him or her shall be divided equally among the residuary legatees," such gift over legacies will be construed to include both real and personal property.—*Estate of Henderson*, 161 Cal. 354, 119 Pac. 496. The following holographic instrument has been

held to be testamentary in character, and not vague, uncertain, or ambiguous as to the intent of the testator, to wit: "Crolldepedro, february 3, 1892. this is to serifey that ie levet to mey wife Real and persnal and she to dispose for them as she wis.—Patrick Donohue."—*Mitchell v. Donohue*, 100 Cal. 202, 38 Am. St. Rep. 279, 34 Pac. 614. Two letters can not be taken together as constituting a holographic will, where the first one, though testamentary in character, is not dated, while the second one, though dated, is not testamentary in character and does not so refer to the first as to incorporate it.—*Estate of Anthony*, 21 Cal. App. 157, 131 Pac. 96. If a writing, in the form of a letter, entirely written, dated, and signed by the hand of a decedent, is admitted to probate as the last will of the deceased, the translation of such letter, made in the trial court, where it was almost entirely in a foreign language,—in this case, the Danish,—is binding upon the supreme court on appeal.—*In re Hoytema's Estate* (Cal.), 181 Pac. 645, 646. Where a writing, in the form of a letter, entirely written, dated, and signed by the hand of a decedent, was admitted to probate as the last will of the deceased, where the writer directed that, in case of her death, the letter should be sent to her brother, but that if he should be dead, the writer wished that two of her nieces, naming them, should sell her property and divide equally between the children of a dead sister named; and where the testatrix made two specific bequests; the testamentary disposition made in favor of the children of the dead sister was conditioned upon the death of the brother before that of the testatrix; hence, where the brother survived the decedent, the two specific bequests were all that passed by the will, and as to the remainder of the estate the testatrix was held to have died intestate.—*In re Hoytema's Estate* (Cal.), 181 Pac. 645, 646.

7. *Vague and uncertain provisions.*—A clause in a will requiring executors to purchase lands, indefinitely designated, and uncertain of value or cost, is void for vagueness and uncertainty.—*Estate of Traylor*, 81 Cal. 9, 22 Pac. 297. If a corporation can be identified by the location of its building, any mistake in or omission of its name will not defeat a testamentary disposition of property to it.—*President and Trustees, etc., v. Keene*, 59 Or. 496, 117 Pac. 426. Upon a question involving the interpretation of part of a will reading "I make the following disposition of my property: Eight thousand dollars to wife, all of which is to be held in trust by J. O. and H. H. Benton without bond—they to pay heirs such rate of interest as shall be agreed upon, until children become of age—and she remains unmarried—in such case money shall fall to my legal heirs," held that the words "in such case" are equivalent to "in case she remarries."—*Benton v. Benton*, 78 Kan. 373, 104 Pac. 856. "In the administration of my estate it is my wish that all property shall be considered and treated as community property. So much of my will I make and declare this day to protect my wife, not yet having been fully advised of my further purposes," held valid disposition to wife of what she would take under law of suc-

cession if property was community property.—*In re Clalborne's Estate*, 158 Cal. 646, 112 Pac. 278.

REFERENCES.

Devises or bequests in severalty of undesignated parcels of property to different persons.—See note 41 L. R. A. (N. S.) 1049. Failure to mention or identify the subject-matter of a devise or bequest.—See note 36 L. R. A. (N. S.) 618. Correction of misdescription of land in will.—See note 6 L. R. A. (N. S.) 942-977. Misnomer in gift to legatee.—See note 4 Prob. Rep. Ann. 81.

8. **Conflicting and inconsistent provisions.**—Where there is a main intention first expressed in a will, and then a secondary or subservient intention, giving directions with reference thereto, the latest direction is not only performable subsequently, but its performance is secondary and subordinate to, as well as dependent upon, the performance of the precedent and primary direction. Courts must effectuate the intention of the testator in sequential order, so far as rules of law will permit.—*Estate of Mayhew*, 4 Cal. App. 162, 87 Pac. 417, 420. A precedent particular description is not to be impaired by a subsequent general description or reference, and words of reference or explanation will never be permitted to destroy a specific grant.—*Portland Trust Co. v. Beattie*, 32 Or. 305, 52 Pac. 89, 91. Under the rule that subsequent general descriptions or references will not impair a specific grant, it has been held that an irregularly shaped tract of wild, unimproved, unclosed, forest land, containing 159.75 acres, may be devised by the residuary clause of a will in which such tract is referred as containing "85 acres more or less."—*Portland Trust Co. v. Beattie*, 32 Or. 305, 52 Pac. 89, 90. The latter, of two apparently repugnant provisions in a will, does not in all cases stand, to the exclusion of the former; for, in case of an inconsistency between a general and a specific provision, the specific provision prevails regardless of the order in which it stands in the instrument.—*Paiko v. Boeynaems*, 22 Haw. 233, 240. In case of the devise of an absolute property in an estate, or the giving of an unrestrained power of sale, a limitation over is void, as being inconsistent with the first estate.—*Sweinhart v. Plant Inv. Co.*, 178 Cal. 125, 172 Pac. 386. A clause, in a will, that manifests a clear intention on the part of the testator to devise a fee, shall not be destroyed by a subsequent disconnected item attempting to reduce the fee to a less estate, unless the entire will indicates that such was the real and fixed intention.—*Topeka Orphans' Home Assn. v. Williams*, 104 Kan. 316, 178 Pac. 616. The old rule, that the devise of a fee may not be impaired by a subsequent contradictory provision, is qualified by the modern rule that the intention as gathered from all parts of the will, must control.—*Scott v. Gillespie*, 103 Kan. 745, 176 Pac. 132, 133. A conflict between two provisions of a will is not to be regarded as irreconcilable unless substantial harmony is found impossible, after the several rules of construction have been applied.—*Lidgate v. Danford*, 23 Haw. 317, 323. Where there is an inconsistency between a general and a specific provision of

a will the latter will prevail regardless of the order in which it stands in the will, as it generally will be a reasonable presumption that the testator intended that the specific provision would operate upon the property named in it and the general provision upon other property.—*Lidgate v. Danford*, 23 Haw. 317, 323. The rule that when a will once gives fee simple title a subsequent contradictory provision must fail, is not applied in these days, when from the words used such rule would go counter to the intention of the testator.—*Scott v. Gillespie*, 103 Kan. 745, 176 Pac. 132. The ancient rule, that when a will once gives a fee simple title a subsequent contradictory provision must fail, yields to the modern one that the intention of the testator is to be gathered from all parts of the instrument.—*Scott v. Gillespie*, 103 Kan. 745, 176 Pac. 132. Where in a will two clauses are found to be in irreconcilable conflict the latter will generally prevail over the earlier unless thereby the manifest intent of the testator gathered from the will as a whole would be defeated.—*Hapai v. Brown*, 21 Haw. 499. Where a will contains repugnant calls in the description of land devised, that call may be rejected which was likely to have least engaged the attention of the testator and in which there was the greatest likelihood of error.—*Cummins v. Riordan*, 84 Kan. 791, 115 Pac. 568. If a testator, in one clause of the will, gives to his wife, the executrix, "authority to sell, dispose of, and use in any way she may deem proper, all my property," and in another says, "I direct and request that she use such or all of the money which may be the proceeds of any property she may sell," the words first quoted confer a general power, which are controlled by the last quoted words, which confer a particular power.—*Beakey v. Knutson*, 90 Or. 574, 174 Pac. 1149, 177 Pac. 955. The general rule is, where a testator has so ambiguously expressed his intention as to create a difficulty in construing the will, making it necessary to go into chancery to get a construction of the will and to remove the difficulty, that the costs of litigation, including reasonable attorneys' fees to all necessary parties, must be borne by the estate; and the general residue is the primary fund for the payment of such costs; but a contest between an annuitant and a residuary legatee as to which one is liable for the payment of an inheritance tax, to which a construction of the will is merely incidental, is not such a case as warrants the allowance of attorneys' fees out of the estate.—*Estate of Crown*, 24 Haw. 573, 577.

REFERENCES.

Gift to persons not designated by name but by general description and as being living at a certain time prior to testator's decease, as a gift to individuals or a class.—See note 34 L. R. A. (N. S.) 945. Time for ascertaining member of class described as testator's "heirs," "next of kin," "relatives," etc., to whom an estate in real or personal property is limited by way of remainder or executory gift.—See note 33 L. R. A. (N. S.) 1.

9. Indefinite and uncertain devises.—A provision in a will providing for the care of a cemetery lot for a period of twenty-five years, is

invalid as being too indefinite to be enforced.—Estate of Koppikus, 1 Cal. App. 84, 81 Pac. 732, 733. An indefinite devise of land may be either for life or in fee according to the intention of the testator as gathered from the whole will.—King v. Hawaiian Trust Co., Ltd., 21 Haw. 619. Where a testator failed to specifically provide for the disposition of property in case of the remarriage of his widow, the disposition which he did make applies in that event where such a construction appears to be in accordance with the testator's purpose as gathered from the entire will.—Klingman v. Gilbert, 90 Kan. 545, 135 Pac. 683. Where a testator does not in terms devise his real estate to any one, but directs his executors to sell it and divide the proceeds among his children, no equitable conversion into personalty results, but each child, upon the death of the testator, becomes the owner of a portion of the real estate, to which the lien of a judgment against such child will attach.—Smith v. Hensen, 89 Kan. 792, 132 Pac. 997. If a testator devise land to "the Old Ladies' Home of Leavenworth, Kansas," an institution, styled "The William Small Memorial Home for Aged Women, at Leavenworth, Kansas," can not successfully claim to be the devise intended.—Small Memorial Home v. Collins' Estate, 97 Kan. 87, 154 Pac. 274. If the owner of a tract, through which a road runs diagonally from southeast to northwest, devises to one person land "on the east side of" the tract and to another "all" that is "left of" the tract, it will be presumed, in the absence of descriptive words more definite, that the testator intended the road to be the dividing line between the properties to be taken under the devises.—In re Peters' Estate, Nuhse v. Peterson, 101 Wash. 572, 172 Pac. 870. A devise or bequest "to some Prodisan orphans Home" is void for uncertainty of beneficiary.—Franklin v. Fairbanks, 99 Kan. 271, 161 Pac. 617. Direction for use of certain money for "suitable monument" to testator's memory held to contemplate shaft or other structure over tomb or grave, and not to authorize erection of a free library as a memorial.—Fancher v. Fancher, 156 Cal. 13, 23 L. R. A. (N. S.) 944, 103 Pac. 206. Where will set apart specified sum for funeral expenses, interment of testator's body, and a suitable monument, it gave executors discretion in selection of monument as to form, style, and cost, having reference to amount of money set apart.—Fancher v. Fancher, 156 Cal. 13, 23 L. R. A. (N. S.) 944, 103 Pac. 206. Remainder to brothers and sisters after deducting portion to which widow, given life estate in all of testator's property, was entitled under laws of state, held to mean one-half of entire community estate and not half of husband's half.—Whalen v. Webster, 159 Cal. 260, 113 Pac. 373. Bequest by implication will arise though no direct language supports it where from uniformity of language such reasonable construction can be placed thereon as implies intent to make a bequest.—In re Blake's Estate, 157 Cal. 448, 108 Pac. 287. Devise over on death of beneficiary without issue held to imply gift to issue.—In re Blake's Estate, 157 Cal. 448, 108 Pac. 287. A bequest of the diamonds of the testatrix for the purpose of raising money for

the publication of her revised edition of the Bible is void for uncertainty.—*Estate of Budd*, 166 Cal. 286, 135 Pac. 1131.

10. **Devise, generally.**—A devise of land by the use of the usual subdivisions of sections is presumed to refer to the public surveys of the United States.—*Hinnen v. Artz*, 99 Kan. 579, 163 Pac. 141. In the absence of anything to suggest the contrary a testator must be understood as asserting that he is the owner of a tract of land which he undertakes to devise, although he does not in terms refer to it as his land or employ any equivalent expression.—*Cummins v. Riordon*, 84 Kan. 791, 115 Pac. 568. Where a testatrix devised adjoining tracts of land in severalty to her two sons and also devised to them as joint owners a certain water right and water ditch used by her to convey water to such lands, which ditch terminated on the portion of the land given to one of the sons, with the request that they jointly use the same, the other son acquires the right to extend the water ditch from its terminus over the land devised to his brother to and for the benefit of his own land and the brother's land is created a servient tenement for that purpose.—*Sulloway v. Sulloway*, 160 Cal. 508, 117 Pac. 522. If a testator devises to one person "the southwest quarter of the southwest quarter of section 18," and thereafter devises to another person the entire section, "less the 40 acres heretofore willed," when, in fact, the land actually comprising the quarter of the quarter-section first devised is less than forty acres, it is not to be inferred that there was an intention to increase, by means of this reference, the property described in the first devise.—*Hinnen v. Artz*, 99 Kan. 579, 163 Pac. 141.

11. **Devise to a class.**—If a class is named as devisees, all of that class shall share under the will equally.—*De Laurencel v. De Boom*, 67 Cal. 362, 7 Pac. 758. A testator, who died March 18, 1911, by his holographic will dated January 9, 1911, made the following bequests: "Fifth: To all employees of the Henry Cowell Lime & Cement Company now working for said firm at Santa Cruz and who have been in said employ for twenty years, the sum of \$1000, and to all who have worked over ten years the sum of \$500 each. Sixth: To all employees in the S. F. of said firm who have worked three years the sum of \$1000 and who have worked two years the sum of \$500 each. In all cases these dates are of January first, nineteen hundred and eleven." Held, that the benefits conferred by the fifth paragraph were limited to persons who were employees of the company on January 1, 1911, and that to entitle them thereto it was not necessary that they should have been employed continuously for twenty and ten years respectively.—*Estate of Cowell*, 167 Cal. 222, 139 Pac. 82. The will in question made the following bequests: "Fifth: To all employees of the Henry Cowell Lime & Cement Company now working for said firm at Santa Cruz, and who have been in said employ twenty years the sum of \$1000 each and all who have worked over ten years the sum of \$500 each. Sixth: To all employees in the S. F. of said firm who have worked three years the sum of \$1000 and who have worked two

years the sum of \$500 each. In all cases these dates are of January first nineteen hundred and eleven." Held, that the sixth clause was not void for uncertainty as to the class of persons who were to receive the legacy; that the initials "S. F." were intended to designate San Francisco, where the company was engaged in business, and that properly construed the clause referred to persons working in San Francisco in the service of the company in any branch of its business.—Estate of Cowell, 167 Cal. 222, 139 Pac. 84. In order to come within the class designated in such sixth clause, the person must have been in the employ of the company on January 1, 1911. If his aggregate service was for a sufficient time, it was not necessary that he should have been employed continuously during the entire period of three or two years.—Estate of Cowell, 167 Cal. 222, 139 Pac. 84. A person engaged in cutting wood for the company on its property, at a specified price per cord, and who worked exclusively for the company, under the supervision of its agent, cutting where he was told to cut, and devoting all his time to such work, was an employee of the company within the meaning of that term as used in the will.—Estate of Cowell, 167 Cal. 222, 139 Pac. 82. Where a testator gave his wife a life estate in real property and directed that after her death the property should be equally divided "among the heirs of the Womersley family," the widow of a deceased brother would not be entitled to participate.—Estate of Womersley, 164 Cal. 85, 127 Pac. 645. Where residuary estate was directed to be converted into cash and paid out to fourteen different legatees in specified percentages, such legatees do not constitute a class, and in the event of the death of any of them their shares go to the heirs at law of the testatrix.—Estate of Kunkler, 163 Cal. 797, 127 Pac. 43. Gift to a class is gift of aggregate sum to a body of persons uncertain in number at time of gift, to be ascertained in futuro, who are all to take in equal or other definite proportions, share of each being dependent as to amount upon ultimate number.—In re Murphy's Estate, 157 Cal. 63, 137 Am. St. Rep. 110, 106 Pac. 230; Estate of Henderson, 161 Cal. 354, 119 Pac. 496. Where there is a gift to a number of persons who are indicated by name, and also further described by reference to the class to which they belong, the gift is held *prima facie* to be a distributive gift and not a gift to a class.—Peck v. Peck, 76 Wash. 548, 137 Pac. 139. The members of a class are to be ascertained at the death of a testator in case of a gift to his heirs, unless a contrary intention clearly appears from the will.—Klingman v. Gilbert, 90 Kan. 545, 135 Pac. 684. Where a will makes a gift to a class, the death of one of the class prior to the death of the testator does not have the effect of causing the legacy to lapse, but those of the class who survive the testator take the whole legacy.—Estate of Murphy, 157 Cal. 63, 137 Am. St. Rep. 110, 106 Pac. 230. Where gift is to devisee's nomination and particular share of each is mentioned, devise is to individuals as tenants in common, and not to class and if words which alone would create class gift are followed by equally operative words of devise to

devisees by name, and in definite proportions, law infers individual taking.—*In re Murphy's Estate*, 157 Cal. 63, 137 Am. St. Rep. 110, 106 Pac. 230. Gift held individual to four children named resulting in intestacy as to share of one dying before testator.—*In re Murphy's Estate*, 157 Cal. 63, 137 Am. St. Rep. 110, 106 Pac. 230. A will, after making various pecuniary bequests and specific dispositions of both real and personal property, gave certain land and specific personal property to the testator's wife, and in the residuary clause, by separate individual provisions, disposed of the residue of the estate, which consisted of both real and personal property, in undivided one-quarter shares to his wife and three children. After so disposing of the residue the will provided that "should any of the legatees herein provided for die before my death, then the legacy provided for him or her shall be divided equally among the residuary legatees." Held, that upon the death of the wife prior to that of the testator, the property, whether real or personal, that would have passed to her under the will had she survived, including what would have passed under the residuary clause, did not lapse, but passed under the gift over to the three surviving residuary legatees. The gift over contained in such substitutionary clause is to the residuary legatees as a class.—*Estate of Henderson*, 161 Cal. 354, 119 Pac. 496. In seeking to ascertain whether a gift is to a class, the paramount consideration is the intent of the testator, as derived from the entire instrument. To this apparent intent, rules of construction must always yield. In such will the substitutionary clause, including the gifts over the residue itself, was added for the very purpose of preventing intestacy as to any part of the estate.—*Estate of Henderson*, 161 Cal. 354, 119 Pac. 496. The mention of the children of the testator as a class, when coupled with words sufficient to show that the class then in the testator's mind includes not only all children in esse but children thereafter to be born, is a sufficient naming of the children, within the meaning of this section to prevent intestacy.—*Gehlen v. Gehlen*, 77 Wash. 17, 21, 137 Pac. 312. The naming of the children of a testator as a class, whether for the purpose of providing for them or for the purpose of disinheritance, when coupled with language conveying either intention, is such a naming as to show that no child has been unintentionally overlooked; former decisions to the contrary are overruled.—*Gehlen v. Gehlen*, 77 Wash. 17, 24, 137 Pac. 312.

12. Clear devises, when not cut down.—When the words of a will, in the first instances, indicate an intent to make a clear gift, such gift is not to be cut down by any subsequent provisions which are of indefinite or undoubtful expression.—*Richards v. Richards*, 36 Cal. Dec. 369, 379. A clear devise or bequest will not be cut down by other expressions or clauses contained in the will, which do not, with reasonable certainty, indicate the intention of the testator to cut down.—*Lohmuller v. Mosher*, 74 Kan. 751, 11 Ann. Cas. 469, 87 Pac. 1140, 1141; *McNutt v. McComb*, 61 Kan. 25, 58 Pac. 965. A devise, in absolute

terms, of the fee of lands, will not be cut down or limited to a less estate by the repugnant or inconsistent words of a succeeding clause of the will, unless it be the manifest intention gathered from the whole instrument that it should be done.—*Boston Safe & Deposit Co. v. Stich*, 61 Kan. 474, 59 Pac. 1082, 1083. If the intention of a testator, in respect to a particular matter, is clearly expressed by the terms of his will, any subsequent expression of intention by the testator must, in order to limit the prior expression of the intention, be equally clear and intelligible, and indicate an intention to that effect with reasonable certainty.—*In re Campbell's Estate*, 27 Utah 361, 75 Pac. 851, 853. Clear and distinct provisions of a portion of a will are not revoked or destroyed by subsequent provisions, not equally clear, or by any inference or argument from other parts of the will.—*Estate of Upham*, 127 Cal. 90, 59 Pac. 315, 318. Where one part of a will clearly indicates a disposition in the testator to create an estate in fee, it will not be restricted or cut down to any less estate by subsequent vague or doubtful expressions.—*Holt v. Wilson*, 82 Kan. 268, 108 Pac. 87. Clause explaining that testator made no money bequests to appellants because realty devised to them was sufficient, held not to exclude appellants from sharing under clause giving any surplus money to the legatees equally.—*In re Goetz's Estate*, 13 Cal. App. 266, 109 Pac. 105. The Civil Code of California, section 1322, declaring that clear and distinct bequests shall not be affected by words not equally clear, held not applicable to destroy the effect of a clause providing for the lapse should any legatee die before the testator.—*In re Goetz's Estate*, 13 Cal. App. 292, 109 Pac. 492. Words subsequently used, which merely raise a doubt or suggest an inference, will not be construed as limiting or cutting down an absolute estate conveyed by one clause of a will.—*Estate of Budd*, 166 Cal. 286, 135 Pac. 1131. The rule embodied in section 1322 of the Civil Code of California, that "a clear and distinct devise or bequest can not be affected . . . by any other words not equally clear and distinct," like other rules of interpretation, is designed to aid in arriving at the intention of the testator as expressed in his will, and must yield to that intention when it appears with reasonable clearness from the words used.—*Estate of Carothers*, 161 Cal. 588, 119 Pac. 926. It is a well-settled rule of construction, as applied to wills, that, where an absolute estate or a certain specific interest given is reasonably clear and in unambiguous language in one part, section, or clause of the will this interest or estate will not be cut down, affected, impaired, or qualified in the same or a subsequent provision, by inference, or argument, or an inaccurate recital of or reference to its contents in other parts of the will, and such estate so vested will be held to be qualified or cut down only by words equally clear and distinct as the words constituting the devise, whether in the same or a separate provision. This rule of construction applied to the will here.—*In re Friss' Will and Estate*, 45 Okla. 399, 149 Pac. 1176, 1177.

REFERENCES.

Cutting down clear devise or bequest by clauses or expressions of doubtful import.—See notes 3 Am. & Eng. Ann. Cas. 615, 10 Am. & Eng. Ann. Cas. 176. Clear and distinct devise, when not affected.—See note Kerr's Cal. Cyc. Civ. Code, § 1322. Compare *Colton v. Colton*, 127 U. S. 300, 32 L. Ed. 138, 8 Sup. Ct. 1164.

13. *Devisees to witnesses.*—Under a statute requiring attestation by two witnesses, a devisee can take nothing under a will witnessed only by himself and another, for, as to such devise, there are not two competent witnesses, as required by statute, and therefore, so far as such devise is concerned, it is no will.—*Clark v. Miller*, 65 Kan. 726, 68 Pac. 1071, 1072. If a will provides a pecuniary benefit for an attesting witness, dependent upon an event which may happen, he has a beneficial interest under it, in contemplation of law; and, under the Montana statute, he is not a legally competent, attesting witness to the will. If the subsequent event, upon which the interest depends, does not happen, that fact does not relate back and restore competency.—*In re Klein's Estate*, 35 Mont. 185, 88 Pac. 798, 805. But a witness to a will is not disqualified from taking a trust estate under it, where such witness has no beneficial interest in the bequest, and is merely a conduit to pass the property to the beneficiary.—*Hogan v. Wyman*, 2 Or. 302, 304. An attesting witness to a will can not be a beneficiary thereunder and as to such witness the devise is void.—*Christiansen v. Talmage*, 69 Or. 440, 138 Pac. 453. The statute of Kansas, making void a devise or bequest to a witness to a will which can not be proved without his testimony applies only to attesting witnesses, not to other persons called upon to testify when the will is offered for probate.—*Sellards v. Kirby*, 82 Kan. 291, 136 Am. St. Rep. 110, 20 Ann. Cas. 214, 28 L. R. A. (N. S.) 270, 108 Pac. 73. While one who attests a will can not be a beneficiary thereunder, this does not preclude a legatee, who can take, from asserting that one who witnessed the will can not take.—*Christianson v. Talmage*, 69 Or. 440, 443, 138 Pac. 452.

14. *Invalid parts in will.*—The invalidity of a provision in a will, easily separable from all the other provisions of the instrument, does not affect the valid portions of the will.—*Estate of Willey*, 128 Cal. 1, 60 Pac. 470, 474. The general rule is that where certain items in a will are valid and others are invalid, unless the valid portions are so inseparably connected with the other parts of the will that if stricken therefrom the general scheme of the testator will be defeated, the will as a whole should not be considered void.—*Chillico v. Hart*, 23 Colo. 40, 35 L. R. A. 41, 45 Pac. 391; *Tilden v. Green*, 130 N. Y. 29, 14 L. R. A. 33, 27 Am. St. Rep. 487, 28 N. E. 880; *John v. Preston*, 226 Ill. 447, 10 L. R. A. (N. S.) 564, 80 N. E. 1001; *Henderson v. Henderson*, 113 N. Y. 1, 20 N. E. 814; *Miller v. Weston*, 25 Colo. App. 231, 138 Pac. 431. If a portion of a will may ever be set aside for want of testamentary capacity, while the rest is upheld, it can only be where the testator, being able to transact business generally, and capable of disposing of his property

in other respects, is unable by reason of some specific delusion or mental defect, to comprehend the effect of the provisions in question.—*Holmes v. Campbell College*, 87 Kan. 597, Ann. Cas. 1914A, 475, 41 L. R. A. 1126, 125 Pac. 25. A testator devised property to his sons, "the heirs and assigns forever"; then by a subsequent clause in his will, he declared "that neither of my sons shall during their lifetime dispose of said interest to any person without the consent in writing of the other two first being had and obtained." Held that the attempted restraint by the testator is void and the devisees acquired the absolute title to the property with the right and power to dispose of it at will.—*Lucas v. Lucas*, 20 Haw. 433. An interest in real estate, attempted to be conveyed by a void devise in a will descends to the person or persons who would have been entitled to such interest had no will been made.—*Kinne v. Phares*, 79 Kan. 366, 100 Pac. 287. Under section 857 of the Civil Code of California, a devise of real estate to trustees in trust to convey to persons named is void, where the instrument discloses an intent that the ultimate beneficiaries shall take only through a conveyance by the trustees, and that no estate or interest, other than a right to enforce the performance of the trust, is given to them.—*Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371. Where a will contains, in addition to words which, standing alone, would be deemed to create a trust to convey, some expression which might be operative to pass the title directly from the testator to the beneficiary, the will should be construed as making a direct devise, and such devise will be given effect, in disregard of the words importing an invalid trust, and it makes no material difference that the direction for transfer is followed, instead of preceded, by the words indicating an intent to make a direct devise.—*Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371. When words which by themselves import an unlawful trust to convey are joined with other words which are sufficient to operate as a direct devise of the interest, the direct devise is not destroyed by the fact that the testator may have attempted to provide in addition for an unlawful method of passing title. In such case the provision for a conveyance is to be regarded as unnecessary, except, perhaps, as convenient and additional evidence of title.—*Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371.

REFERENCES.

Invalid clause in will, effect of, on clauses otherwise valid.—See note 3 Am. & Eng. Ann. Cas. 950.

15. Rule favoring testacy.—It is a fundamental principle that a construction of a will favorable to testacy will always obtain when the language used reasonably admits of such construction.—*McClellan v. Weaver*, 4 Cal. App. 593, 88 Pac. 646, 647, citing *Estate of Dunphy*, 147 Cal. 95, 81 Pac. 315. A presumption of intestacy arises from the fact of death, in the absence of allegation and proof to the contrary.—*Jacquish v. Deming*, 40 S. D. 265, 167 N. W. 157, 158. It is presumed testator intended to dispose of entire estate.—*In re Blake's Estate*, 157 Cal.

448, 108 Pac. 287. In the absence of a definite provision to the contrary it is presumed that a testator intended to dispose of the whole of his estate.—*Singer v. Taylor*, 90 Kan. 285, 133 Pac. 843. Presumption against intestacy is subject to cardinal rule requiring construction according to the intention of testator.—*In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287. Especially where an intention to dispose of the whole estate is evinced.—*In re Gregory's Estate*, 12 Cal. App. 309, 107 Pac. 566. Rule against intestacy can not be invoked to defeat plain rules of law declaring when gift is individual.—*In re Murphy's Estate*, 157 Cal. 63, 137 Am. St. Rep. 110, 106 Pac. 230. It is presumed that a testator intended to dispose of all his property by his will and a construction of a will favorable to testacy will always obtain when the language used reasonably admits of such construction.—*Estate of O'Gorman*, 161 Cal. 654, 120 Pac. 33. Where a will may reasonably be interpreted in two ways, one of which results in intestacy while the other leads to an effective testamentary disposition, the interpretation which will prevent intestacy is to be preferred.—*Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371. The testator by his will left all his estate which was subject to his testamentary disposition, the same being entirely community property and consisting of both realty and personalty, to trustees in trust (1) "to pay over the net annual income thereof to his wife during the term of her natural life"; (2) upon her death, "to divide said estate into three equal parts, when one of said parts shall be forthwith assigned, transferred, set over and delivered by my said trustees" to each of two of his sons, "and the same shall be and become his absolutely and forever"; (3) "to pay over the net annual income derived from the remaining equal third part to his daughter during her natural life, and upon the death of said daughter, to pay over the principal of said one-third part, with all accumulations of the income therefrom, to her children then living, and so that each child shall receive an equal share thereof, and the same shall become his or hers absolutely and forever." The will further provided that children of deceased children of said daughter should take the share which the parent would have taken had he or she survived said daughter, "and the same shall be divided between said children share and share alike," and that upon the death of said daughter without child, children, or grandchildren her surviving, the trustees should pay over the principal of said one-third part, with all accumulations of income therefrom, to his aforesaid sons, share and share alike, "and the same shall become theirs absolutely and forever." It further provided, that if either of his said sons should not be living at the time of his death or at the time of his wife's death, then all the legacies and devises given to him should go to his lawful issue, share and share alike, "and the same shall be and become theirs absolutely and forever." The trustees were empowered to invest and reinvest the trust estate, and to sell any portion thereof, at their discretion. Held, that the will did not create a trust to convey, partition, or make allotments

of real estate, which would be invalid under sections 847 and 857 of the Civil Code of California, but, properly construed, made direct devises of legal estates to the beneficiaries as tenants in common.—*Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371. The rule that favors testacy as against intestacy operates only where the existence of the testamentary intent is ascertained and the subject-matter of doubt is one of construction. Where there is a doubt as to the existence of the animus testandi, the rule is not applicable.—*Estate of Anthony*, 21 Cal. App. 157, 131 Pac. 96. Courts are not permitted, in order to avoid a conclusion of intestacy, to adopt a construction based on conjecture as to what the testator may have intended, where such intention is not expressed.—*In re Hoytema's Estate* (Cal.), 181 Pac. 645, 646. Constructions of a will leading to intestacy, total or partial, are not favored, and will be rejected when the language used reasonably admits of a construction that renders the will effective as to all the property of the decedent.—*In re Hoytema's Estate* (Cal.), 181 Pac. 645, 646. A will is always to be interpreted so as to prevent intestacy if such an intention is reasonably possible.—*Estate of Silva*, 169 Cal. 116, 145 Pac. 1015. Where the meaning of a will is in doubt that interpretation is to be preferred that will avoid intestacy as to the whole or any part of the estate.—*Estate of Whitney*, 176 Cal. 12, 167 Pac. 399.

REFERENCES.

Intestacy to be avoided.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1326.

16. *Partial Intestacy*.—If, in a will, there are no other apt words disposing of the property, upon the failure of a trust, intestacy as to such property must be the result.—*Estate of Heberle*, 153 Cal. 275, 95 Pac. 41, 42. A will giving and bequeathing "the use and income of all of my property of which I may die possessed," etc., but containing no words as to the disposition of the fee, relates only to the "use and income." Under such an instrument, there having been no disposition of the residuum, the testator died intestate as to such residuum or fee.—*Estate of Reinhardt*, 74 Cal. 365, 16 Pac. 13, 14. Where the testator creates a trust, void as to the real property situated within the state, it follows that, as to such property, the deceased died intestate, and the same descends by succession to his heirs at law.—*Campbell-Kawannanako v. Campbell*, 152 Cal. 201, 92 Pac. 184, 196; *Estate of Walkerly*, 108 Cal. 627, 660, 752, 49 Am. St. Rep. 97, 41 Pac. 772. Where a will contains no residuary clause, and is susceptible of a construction that will, without violating the testator's evident intention, prevent partial intestacy, it should be so construed.—*In re Peters' Estate*, *Nuhse v. Peterson*, 101 Wash. 572, 172 Pac. 870. Where the court was called upon judicially to construe a will upon the settlement of a trust created thereunder, and construed it as involving a partial intestacy, under a devise to a granddaughter, who died leaving issue, before she had become entitled to any distribution of the corpus of the estate, such construction of the will involves pure conclusions of law, and heirs who had received their full share of the corpus of

the estate willed to them, and an additional share by reason of the partial intestacy so declared, are not protected on appeal merely on the ground of a finding of facts in their favor not assailed in a bill of exceptions.—*Estate of Blake*, 157 Cal. 448, 108 Pac. 287.

REFERENCES.

The presumption against partial intestacy is treated in a note to *Lavender v. Rosenheim*, 132 Am. St. Rep. 427. Advancements, doctrine of, in cases of partial intestacy.—See note 6 Am. & Eng. Ann. Cas. 1011.

17. *Perpetuities*.—A devise and attempted trust, where the testator provides in his will for a permanent fund in trust, the income of which is to be devoted for all time to the care of his place of interment, is invalid as a perpetuity, not for a charitable use.—*Estate of Gay*, 138 Cal. 552, 94 Am. St. Rep. 70, 71 Pac. 707, 708. If a will gives and bequeaths an estate to two daughters, and provides that, upon the death of either of them, after the death of their mother, the said property shall all be and become the property of the children of the other daughter in fee, the executory devise over is not void or too remote, as the whole estate must vest absolutely within lives in being, and twenty-one years afterward, it appearing from the context of the will that its language was intended to relate to death during minority.—*Buchanan v. Schulderman*, 11 Or. 150, 153, 1 Pac. 899. Where the will provided for a limitation over to the children of the testator, there being three of the testator's children living when the will was made, and the remaining child being born prior to the testator's death, and the will provided that "the fee to the proceeds of the property in question was to vest in them when the youngest child became of age"; the limitation over, and the estate sought to be conferred thereby, are not void for remoteness, and a perpetuity prohibited by law is not thereby created.—*Coleman v. Coleman*, 69 Kan. 39, 76 Pac. 439. The suspension of the power of alienation, which is prohibited by the statute, is such as arises from the terms of the instrument by which the estate is created, and not such as exists outside of that instrument—as a disability of the person in whom an interest is vested, or the delay incident to procuring an order of court for the sale, or for its confirmation.—*Estate of Pforr*, 144 Cal. 121, 127, 77 Pac. 825. The doctrine as to perpetuities does not apply to grants, devises, or bequests to charitable uses.—*Staines v. Burton*, 17 Utah 331, 70 Am. St. Rep. 788, 53 Pac. 1015. The rule against perpetuities which prohibits the suspension of the fee to real estate or of the vesting of title to personalty, for a longer period than that of designated lives in being at the time of the death of the testator, and twenty-one years and nine months thereafter, is not violated by a provision in the will as follows: "I hereby constitute William E. Weston and L. S. Smith of Fairplay, Colorado, and either of them should the other be dead or refuse to act, executors of this my will and trustees of my property, real and personal, and all right and credits, to whom, on the admission of this will to probate, the title rights and ownership of my said

property rights and credits shall go, etc."—*Miller v. Weston*, 25 Colo. App. 231, 138 Pac. 429. Under rule against perpetuities requiring that future interests within its scope should vest within twenty-one years, exclusive of period of gestation, after a life or lives in being, it is not enough that the future interest may or in all probability, will, vest within the limits. It must necessarily so vest.—*Klingman v. Gilbert*, 90 Kan. 545, 135 Pac. 683. The fact that the right of a minor to receive real property and the accumulated income is dependent upon the contingency of his attaining the age of majority, and that under the other provisions of the deed as to the devolution of the property upon the termination of the trust by his death before his majority, such accumulations, if any, will become the property of others who are not minors, and who are persons in whose favor a direction to accumulate would not be valid, is immaterial.—*Hornung v. Sedgwick*, 164 Cal. 629, 130 Pac. 212. Where a trust is created by deed by which the trustee was to manage the property and provide for the education and maintenance of a minor beneficiary; that upon attaining his majority, the minor was to have absolutely the property described; that in case such minor should die before reaching majority, then such property to go to other named grantees—such trust is valid under sections 724, 852, 857, Civil Code of California.—*Hornung v. Sedgwick*, 164 Cal. 629, 130 Pac. 212. A person, possessed of the required mental capacity, has the right to dispose of his property upon the specified terms and conditions contained in a will, duly executed by him as his voluntary act, which does not create a perpetuity and is definite and certain in respect to property rights.—*In re McGinnis's Estate*, *McGinnis v. Condrón*, 91 Or. 407, 179 Pac. 254. An absolute devise of all of the property of the deceased to trustees, to be held by them during the period of the trust, and to be managed in their discretion for the use and benefit of his children until such time as the youngest shall reach the age of 30 years, or the trust shall be otherwise terminated in the discretion of the trustees, does not create a perpetuity.—*In re McGinnis's Estate*, *McGinnis v. Condrón*, 91 Or. 407, 179 Pac. 254. If, by the terms of a will, each of the testator's six sons is to receive his one-sixth portion on attaining the age of thirty, an express trust, declared by the will, to a trustee to hold and invest the property, thus diminishing in sixths from time to time, until the taking by the youngest son, on which event the trust is to cease, does not violate the law against perpetuities, even though the youngest son be but one year old at the time of the testator's death.—*Estate of Rawitzer*, 175 Cal. 585, 166 Pac. 581. A bequest of the income of an estate to a fraternal order providing it build an orphans' home, is not invalid as a perpetuity, if a charitable bequest of a public nature be indicated, not confined to a special class of orphans.—*In re Hartung*, 40 Nev. 262, 160 Pac. 782, 161 Pac. 715. A provision in a will that no disposition should be made of certain property "within twenty years after the death of my beloved wife," is void under the rule against perpetuities.

—*Lasnier v. Berthiaume*, 102 Kan. 551, 554, 171 Pac. 645; *Lasnier v. Martin*, 102 Kan. 551, 554, 171 Pac. 645. The rule against perpetuities is that no future interest in property can lawfully be created which does not necessarily vest within twenty-one years after some life or lives presently in being, excluding from such computation of years the incipient life of infants en ventre sa mere.—*Lasnier v. Berthiaume*, 102 Kan. 551, 553, 171 Pac. 645; *Lasnier v. Martin*, 102 Kan. 551, 553, 171 Pac. 645. The tying up of property beyond a life or lives in being and twenty-one years afterward is a perpetuity, but a trust for a public charitable purpose is valid, though the trust is in perpetuity.—*Bauer v. Myers* (Kan.), 244 Fed. 902, 909.

REFERENCES.

Limitation of estate upon the probate of a will as a violation of the law against perpetuities.—See note 10 L. R. A. (N. S.) 564, 565. Perpetuities, effect of contemporaneous or prior interest.—See note 5 Am. & Eng. Ann. Cas. 431.

18. Charitable bequests.

(1) *In general*.—The rule against perpetuities is said to have no application to charitable trusts. Such trusts are not, however, exempt from the rule, barring one important exception; a gift to charity, then over to charity, forms the exception, and this is sustained upon the reasoning that, as one charitable use may be made perpetual, speaking in a general and natural sense, the gift to two in succession can be of no longer duration or of greater evil. If a gift be to charity, then over to an individual, or to an individual, then over to charity, the rule is effective, and has perfect application.—*In re John's Will*, 30 Or. 494, 36 L. R. A. 242, 47 Pac. 341, 347. In the absence of a law prohibiting the same, a public corporation may take and hold property in trust for a charitable or public purpose.—*Raley v. Umatilla County*, 15 Or. 172, 176, 3 Am. St. Rep. 142, 13 Pac. 890. A bequest for the benefit of the testator alone, to have masses celebrated for his soul, is not a charitable bequest; nor is such a bequest contrary to any provision of the law of the state of California, there being no law which declares such a bequest to be in its nature a superstitious use.—*Estate of Lennon*, 152 Cal. 327, 92 Pac. 870, 871. That an alleged will is invalid and contrary to the laws of the state of California, relating to charitable uses, is not a ground for a revocation of the probate of a will. "The education and preferment of orphans," is regarded as a public charity, and a devise in a will, in trust, for the founding, establishing, and forever maintaining a permanent college for such purposes is valid; and the city of Denver, in its corporate capacity, has power to accept the trust so created, and to execute it in accordance with the intention of the testator as expressed in his will.—*Clayton v. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117, 59 L. R. A. 407, 70 Pac. 429, 439. A technical school, the primary and main purpose of which is to take such girls as choose to go to it, and who are fourteen

years old or more, and to give them such special training as will fit them for certain vocations in life, is not an orphan asylum, within the meaning of a will bequeathing a fund to "orphan societies."—Estate of Pearson, 125 Cal. 285, 57 Pac. 1015, 1016. There is no limitation under the laws of California, except as prescribed by section 1313 of the Civil Code of that state, upon the right of a person to dispose of his property in favor of charitable purposes.—Estate of Dwyer, 159 Cal. 680, 115 Pac. 242. A bequest to the city of Sacramento, Cal., as a memorial to the husband of the testatrix, of the sum of \$30,000 for the erection of a suitable fountain for the benefit of thirsty animals is a gift to a charitable use.—Estate of Coleman, 167 Cal. 241, 138 Pac. 992. In the will of Bernice Puahi Bishop the direction to the trustees "to devote a portion of each year's income to the support and education of orphans and others in indigent circumstances" refers to support and education at the Kamehameha School only, and not to support independently of education.—Smith v. Lindsay, 20 Haw. 330. A gift to a particular church is a gift to the pastor or rector of that church, or to the vestrymen or trustees of the congregation, or to the presiding elder or bishop, or to any other person or persons to whom the revenues of that particular church are payable or by whom they are controlled or disbursed.—Rutherford v. Ott, 37 Cal. App. 47, 173 Pac. 490. A will in order to create a charitable trust in perpetuity must be confined in its application to charitable uses only.—Estate of Sutro, 155 Cal. 727, 102 Pac. 920. It does not detract from the character of a charitable bequest that no part of the money bequeathed goes to the charities, if the earnings of the bequest go to them; for that is sufficient to stamp the character of charitable bequests upon the principal.—Bauer v. Myers (Kan.), 244 Fed. 902, 914.

(2) *Favored by the courts.*—Courts look with favor upon all attempted charitable donations, and will endeavor to carry them into effect, if it can be done consistently with the rules of law. A bequest intended as a charity is not void, and there is no authority to construe it to be legally void if by any possibility it can be made good.—Estate of Willey, 128 Cal. 1, 60 Pac. 470, 474, 56 Pac. 550, 554; Estate of Hinckley, 58 Cal. 457. Charities, both as to trustees and beneficiaries, are more liberally construed than are gifts to individuals; so a gift to the trustees or managers of an orphan's home, although not constituting a corporation, is not void for uncertainty as to the beneficiary.—Estate of Upham, 127 Cal. 90, 59 Pac. 315, 317. A devise to charity is not rendered invalid because trustees are not named, nor because a trustee incapable of taking is named. The court, in the exercise of its judicial function, will never permit a trust to fail for the want of a trustee.—Clayton v. Hallett, 30 Colo. 231, 97 Am. St. Rep. 117, 59 L. R. A. 407, 70 Pac. 429, 434. If a gift is made for public charitable purposes, it is immaterial that the cestui que trust are indefinite or uncertain, or that the trustee is uncertain or incapable of taking.—Wadhams v. Pennoyer, 20 Or. 274, 279, 11 L. R. A. 210, 25 Pac. 720.

In a devise for charitable uses, it is immaterial that the objects of the charity are uncertain and indefinite. Beneficiaries, as individuals, must necessarily be uncertain in a public or charitable trust.—In *re Stewart's Estate*, 26 Wash. 32, 66 Pac. 148, 149. Under section 1313 of the Civil Code of California, no charitable devise or bequest can exceed one-third of the estate of a decedent leaving legal heirs, and all dispositions of the property to the contrary shall be void; but it can not be urged that such a devise or bequest is void for the reason that the amount of the estate applicable thereto is so small that it be inadequate for the purpose contemplated. Courts look with favor upon all attempts at charitable donations, and will endeavor to carry them into effect, if it can be done consistently with the rules of law; and the court has power, under the doctrine of *cy pres*, to direct the trustees of the estate to sell the undivided one-third interest, and to use the proceeds in such a manner as to carry out the intent of the testator, although not precisely in the manner he may have contemplated.—*Estate of Peabody*, 154 Cal. 173, 97 Pac. 184, 186. Charitable trusts are highly favored and a liberal construction will be adopted in order to render them effectual. Such trusts are not within the rule against perpetuities, nor are they affected by, or within the scope of statutory or constitutional provisions against perpetuities in general. Such trusts are distinguished from an ordinary trust by the uncertainty of their beneficiaries. Such uncertainty does not cause a charitable trust to fail. The names of the beneficiaries need not be mentioned in the will creating the trust. If the language used indicates with reasonable certainty the objects of the testator's bounty, it is sufficient. Charitable trusts do not fail for want of trustees. The legal estate in such a case is regarded as in abeyance or as vested in the heirs of executors of the donor for the use of the beneficiary or the court will appoint a trustee to carry out the charitable purposes of the testator.—*Hagan v. Sacrison*, 19 N. D. 160, 26 L. R. A. (N. S.) 724, 123 N. W. 518. Dispositions to charity are looked upon with favor and the courts will uphold all such gifts, whether made by a donor in his lifetime or by a testator, when it can be done consistently with the rules of law.—*Estate of Dwyer*, 159 Cal. 680, 115 Pac. 242.

(3) *Construction of statutes.*—The California statute, limiting bequests or devises to charity to a specific fractional portion of the estate, applies only to wills; it does not apply to a trust not testamentary in character.—*Rutherford v. Ott*, 37 Cal. App. 47, 173 Pac. 490. Section 1313 of the Civil Code of California was not enacted for the public good or as a matter of state policy, but for the benefit exclusively of the heirs at law, and as a protection against hasty and improvident gifts to charity by a testator of his entire estate to the exclusion of those who in the judgment of the legislature had a better claim to his bounty.—*Estate of Dwyer*, 159 Cal. 680, 115 Pac. 242. If any will falls under the inhibition of that section, the section itself provides for the disposition of the assets of the estate, which must

follow.—Estate of Sennon, 152 Cal. 327, 92 Pac. 870, 871. That section, whereby only one-third of an estate can be distributed to charitable purposes, does not apply so as to cut down a specific legacy, where the excess of a third appears only by adding such legacy to the residuary bequest.—Estate of Sloane, 171 Cal. 248, 152 Pac. 540.

(4) **Validity.**—A bequest to the public library of the city of Stockton, made by a will executed within thirty days of the death of the testatrix is invalid, as a charitable gift under section 1313 of the Civil Code of California.—Estate of Budd, 166 Cal. 286, 135 Pac. 1131. A bequest of one-half of the income of certain property to an incorporated association known as "Christ Doctrine Revealed and Astronomical Science Association," made by will executed within thirty days of the death of the testatrix, is void, under the provisions of section 1313 of the Civil Code of that state.—Estate of Budd, 166 Cal. 286, 135 Pac. 1131. Under section 1285, as amended in 1905, and section 1313 of the Civil Code of California, provisions in the will of a non-resident testator, collectively disposing of more than one-third of his estate to charity, although valid according to the law of his domicile, operate to pass title to only one-third of his personal property in the state of California.—Estate of Lathrop, 165 Cal. 243.

(5) **Amount distributable.**—The expression "one-third of the estate of a testator," as used in section 1313 of the Civil Code of California, limiting charitable bequests or devises to that amount, means one-third of the entire distributable estate of the testator wherever located; it does not mean one-third of the estate distributable alone in this state.—Estate of Dwyer, 159 Cal. 680, 115 Pac. 242. Under the law of the state of California it is only one-third of the distributable assets of the estate of a testator, after payment of debts and charges of administration, which can be distributed to charity.—Estate of Dwyer, 159 Cal. 680, 115 Pac. 242. Where a testator devises to charitable purposes the proceeds of certain real estate, it is only the net proceeds, after deducting the expenses of effecting its sale, which can be so distributed.—Estate of Dwyer, 159 Cal. 680, 115 Pac. 242. Where a testatrix died domiciled without this state, leaving to trustees for charitable purposes the whole of that portion of her estate which was subject to administration under the laws of this state, the trustees are entitled to the distribution of the whole thereof if its value, together with the value of the estate distributable elsewhere to charity, did not exceed one-third of the entire distributable estate of the testatrix wherever located.—Estate of Dwyer, 159 Cal. 680, 115 Pac. 242. A charitable gift in a foreign will of personal property in this state is governed by the same rules as are like bequests in domestic wills; and if the bequest is in excess of one-third of the estate, the domiciliary executors are not entitled to have the whole estate distributed to them.—Estate of Lathrop, 165 Cal. 243, 131 Pac. 752.

REFERENCES.

Charitable uses, devise to.—See note 80 Am. Dec. 315. What is a charity or charitable use.—See notes in 63 Am. St. Rep. 248, Ann. Cas. 1912D, 58, Ann. Cas. 1912A, 1187. Applicability of statutes relating to charitable bequests or devises to precatory gifts for charitable purposes.—See note 22 L. R. A. (N. S.) 1262. Charities, devise or bequest to churches as charitable uses.—See notes 4 Am. & Eng. Ann. Cas. 1139, 9 Am. & Eng. Cas. 1202. Cy pres doctrine, general charitable intent essential to application of.—See note 1 Am. & Eng. Ann. Cas. 541. Effect of specifying use of real estate, in devise to religious society.—See notes 11 L. R. A. (N. S.) 509-528. Charitable bequests, limitation as to time and amount.—See note Kerr's Cal. Cyc. Civ. Code, § 1313.

19. Pretermitted children.—A will, although not revoked, is rendered, as to its devises and legacies, nugatory, where a child of the testator was born after his death, and the will made no provision for either the widow or child, nor manifested any intention to disinherit the child, and where the widow, after the admission of the will to probate, renounced under the will, and elected to take under the statute.—Estate of Hobson, 40 Colo. 332, 91 Pac. 929, 930. Where a testator omitted to provide for his child or children, the law operates to give such child or children the same interest in the estate as if the father had died intestate; and the widow becomes only a tenant in common with her children in the real property belonging to the estate, all taking subject to administration, and subject to the community rights of the widow.—Estate of Grider, 81 Cal. 571, 22 Pac. 908, 909. Under the common law, confirmed in New Mexico, prior to the passage of the statutes changing the rule, a child could be disinherited, without being mentioned in a will, unless it affirmatively appeared that the omission of his name occurred through inadvertence or mistake.—In re McMillan's Estate, 12 N. M. 31, 71 Pac. 1083, 1084. The failure of deceased to mention his children in his will renders such will void as to such children, and oral testimony that deceased intended to omit them is inadmissible.—Morrison v. Morrison, 25 Wash. 466, 65 Pac. 779, 781. Under the statute there must be some substantial provision for the children, of which they can legally avail themselves, or else there must be an actual naming of such children in the will, or the same will be ineffectual as against such children.—Barnes v. Barker, 5 Wash. 390, 31 Pac. 976; In re Barker's Estate, 3 Wash. 390, 31 Pac. 976, 977; Purdy v. Davis, 13 Wash. 164, 42 Pac. 520. The statute providing that the children must be named or provided for in the will, to render the same valid, refers to some beneficial legal provision, and it is not sufficient that an absolute devise be made to another, even though the testator thought that the interest of the child would be better subserved by such devise than by one directly to him.—Purdy v. Davis, 13 Wash. 164, 42 Pac. 520. The object of the statute providing that omitted children shall be entitled to such proportion of the estate of the testator as if he had died

intestate, is to provide against any such children being disinherited through inadvertence of the testator at the time he makes his will.—*Bower v. Bower*, 5 Wash. 225, 31 Pac. 598. Extrinsic proof can not be introduced in aid of a will which omits to provide for a child in contravention of the statute.—*Bower v. Bower*, 5 Wash. 225, 31 Pac. 598, 599. The intent not to provide for a child, or the issue of one, shall not be inferred from the omission to make such provision in his will, though he expressly gives all his estate to persons named.—In *re Atwood's Estate*, 14 Utah 1, 60 Am. St. Rep. 878, 45 Pac. 1036. Under the Utah statute, heirs, legatees, and devisees under a will are disqualified as witnesses against an omitted child.—In *re Atwood's Estate*, 14 Utah 1, 60 Am. St. Rep. 878, 45 Pac. 1036. Where the will omits to provide for a child of the testator, the presumption is that the omission was not intentional, and in such a case the statute providing for succession by a pretermitted child applies. The presumption raised by the statute that the omission, by a testator, to provide for any of his children was not intentional, may, however, be rebutted by extrinsic evidence, whether of declarations of the testator, or collateral facts showing the intention of the testator to have been that which the language of the will expresses.—In *re Atwood's Estate*, 14 Utah 1, 60 Am. St. Rep. 878, 45 Pac. 1036. Construing the provisions of section 5119, Revised Codes of North Dakota, 1905, which provide that "when any testator omits to provide in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section," it is held that the fact that the lawful issue of a testator is omitted from his will merely raises a prima facie presumption that such issue was not intentionally omitted, and that such presumption is rebuttable by extrinsic proof.—*Schultz v. Schultz*, 19 N. D. 690, 125 N. W. 555. Under the statute of the state of Washington which provides that if any person make his last will and die leaving a child or children, or descendants of such child or children, in case of their death, not named or provided for in such will, although born after the making thereof, or the death of the testator, every such testator, so far as he shall regard such children or their descendants not provided for, shall be deemed to die intestate, and the naming of the children as a class whether for the purpose of providing for them or for the purpose of disinheritance, when coupled with language conveying either intention, is such naming as to show that no child has been intentionally overlooked, to avoid which contingency was the sole purpose of the statute.—*Gehlen v. Gehlen*, 77 Wash. 17, 137 Pac. 313, 315, overruling all former decisions which might be construed as holding the contrary. Evidence dehors the will is admissible to show whether the omission of a child from a will was intentional or not.—In *re Peterson's Estate*, 49 Mont. 96, Ann. Cas. 1916A, 716, 140 Pac. 239. If a testator

gives a designated amount to each of his children, and devises the residue of the estate to his wife, without naming or providing for a child, born after the making of the will but prior to the death of the testator, it is doubtful whether the designation, "each of my children," when coupled with a provision for each, would include such a child, as the supreme court has never yet so held; hence, where the testator was in a chain of title, and the title to property offered to a purchaser depends on a conveyance from the widow, who refuses to take steps to quiet the title as to such child, such title is not one that the purchaser can be compelled to accept; it is not free from reasonable doubt, as there is a constant danger of a lawsuit to determine its validity.—*Moore v. Elliott*, 76 Wash. 520, 523, 136 Pac. 849. It is not necessary, under the statute of Washington, for the children of a testator to be specifically named, or named by terms of individual identification; they can not be disinherited if named as a class, the real purpose of the statute being to prevent pretermisison.—*Gehlen v. Gehlen*, 77 Wash. 17, 21, 137 Pac. 312. Under section 4755 of the Rev. Codes of Montana, evidence dehors the will may be received to ascertain whether the omission of the testator, to provide in his will for any of his children, was intentional.—*In re Estate of Peterson, Chellquist v. Eustance*, 49 Mont. 96, Ann. Cas. 1916A, 716, 140 Pac. 237. The object of the statute of New Mexico is not to compel the testator to make any substantial provision for his children, but simply to provide against the child being disinherited through inadvertence of the testator at the time he makes a will.—*Smith v. Steen*, 20 N. M. 436, 150 Pac. 927, 929. The declaration in a will, "those of my heirs not herein mentioned have been omitted by me with full knowledge thereof," sufficiently indicates the testator's intention that children of his not so mentioned shall take no part of his estate.—*Estate of Hassell*, 168 Cal. 287, 142 Pac. 838. Before what one considered the "natural rights" of children to share in the inheritance of their immediate ancestors shall be taken away, the intent that they shall not so share must appear on the face of the will strongly and convincingly.—*Estate of Hassell*, 168 Cal. 287, 142 Pac. 838. The son and sole heir of a testator's daughter, made legatee by the will and dying before the testator, does not take the legacy, as the result of a codicil to the will, republishing the same, executed after such death; but, if not himself mentioned in the will, may claim as a pretermitted heir.—*Estate of Matthews*, 176 Cal. 576, 169 Pac. 233. The remedy of a pretermitted child, is not by a contest, but simply by a motion that its part be set over to it in the course of probate.—*In re Hoscheid's Estate*, 78 Wash. 309, 322, 139 Pac. 61. The remedy of the pretermitted child, as it concerns the real estate conveyed by the executrix is by way of suit to quiet title, or partition, or both, and not to set aside the conveyances, in the absence of fraud.—*Smith v. Steen*, 20 N. M. 436, 150 Pac. 927, 929. Under section 5119, Rev. Codes 1905 (North Dakota), it is held that parol testimony is admissible to establish the fact that the omission of a child from the will was intentional.—*Schultz v. Schultz*, 19 N. D. 688.

REFERENCES.

Effect of will upon pretermitted adopted child.—See note 115 Am. St. Rep. 587. Pretermitted heir may take as child en ventre sa mere.—See note 119 Am. St. Rep. 950. Rights and remedies of omitted child.—See note 115 Am. St. Rep. 580. Pretermitted children, when to succeed to estate.—See note Kerr's Cal. Cyc. Civ. Code, § 1307.

20. After-born children.—A child of a testator, born after his death, and who was not named or provided for in the will, takes under the law of descent, in all respects as if no will had been made.—Northrop v. Marquam, 16 Or. 173, 18 Pac. 449, 457. While the will is valid and effectual as to all the children named and provided for therein, it is no will as to those named or provided for, and any such child, including one en ventre sa mere, may take under the law of descent, in all respects as if no will had been made.—Northrop v. Marquam, 16 Or. 173, 186, 18 Pac. 449, 457. Where a child is born after the making of a will, and the testator dies, leaving such child unprovided for, the child succeeds immediately, by operation of law, as if the testator had died intestate; and all legacies and devises, whatever their character, must contribute in such a case, unless the obvious intention of the testator in relation to some particular legacy or devise would be thereby defeated, in which case all the remaining legacies and devises must contribute proportionately.—Estate of Smith, 145 Cal. 118, 78 Pac. 369, 370. Where a testator gave his children a pecuniary legacy and devised all his real estate to his wife and there was a child born to him after the making of the will, under the laws of Washington the widow can not give such a marketable title to the land as an unwilling purchaser can be required to accept, inasmuch as the subsequent born child would be entitled to its interest in the property.—Moore v. Elliott, 76 Wash. 520, 136 Pac. 849. The statute of the state of Washington as to pretermission of children provides that as to such child the testator shall be deemed to have died intestate, and provides for contribution by the devisees and legatees under the will to make up the share of such child as an heir.—In re Hoscheid's Estate, 78 Wash. 309, 139 Pac. 66. An after-born child must necessarily be described as an after-born child, but that is only a naming by class, just as the designation of living children as "my children" would be a naming by class.—Gehlen v. Gehlen, 77 Wash. 17, 21, 137 Pac. 312.

REFERENCES.

Devises of life estates to unborn children of living persons, as contravening the rule against perpetuities.—See note 6 L. R. A. (N. S.) 330-333. Admissibility of extrinsic circumstances in ascertaining intention of testator in respect to disinheritance of an after-born child.—See note 13 L. R. A. (N. S.) 781-782. Consult notes to the following sections of Kerr's Cal. Cyc. Civ. Code, as to the subjects indicated: Child en ventre sa mere, § 1339; after-born child, unprovided for, right of, to succeed, § 1306; after-born child, share of, out of what portion of estate to be paid, § 1308.

21. **Adopted children.**—Under the Washington statutes, providing for the rights and privileges of adoption, an adopted child is entitled to all the rights and privileges of a child begotten in lawful wedlock, and such an adopted child, when omitted in a will or unprovided for therein, is entitled to the same portion of the estate of the testator, real and personal, as if he had died intestate. The same shall be assigned to him, and all the other heirs, devisees, and legatees shall refund their proportional part.—*Van Brocklin v. Wood*, 38 Wash. 384, 80 Pac. 530, 531, 532.

22. **Restriction on alienation.**—Allowing for a period of gestation, the will effects no undue suspension of the power of alienation upon the death of the testator's widow. As the direct devise, vesting at the death either of the testator's widow or of his daughter, are given to all of the ultimate beneficiaries, the fact that among the takers there may be a child en ventre sa mere does not effect an undue suspension of the power of alienation.—*Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371. If the effect of limitations contained in a will is to create future interests, which suspend the absolute power of alienation for a period longer than during the continuance of lives in being at the death of the testator, such limitations are invalid.—*Estate of Whitney*, 176 Cal. 12, 167 Pac. 399.

23. **Equitable conversion.**—Express words giving title to executors are not essential to equitable conversion when such is the necessary effect and intention of the will.—*Manhattan State Bank v. Hald*, 97 Kan. 297, 155 Pac. 57. If the testator, after disposing of part of his property, directs the remainder of it to be sold by his executors, and the proceeds to be used in a certain manner, this constitutes an equitable conversion of such remainder of the property into money and creates a fund.—*In re Hawgood's Estate*, 37 S. D. 565, 579, 159 N. W. 117. Where executors are vested with naked authority to sell, and to divide the proceeds among the testator's heirs, an equitable conversion does not arise.—*Manhattan State Bank v. Hald*, 97 Kan. 297, 155 Pac. 57. A testatrix directed that her entire estate, real and personal, be sold and converted into money, and that this money (save for some minor dispositions) be divided among her five children. Of these, four were to take in fee while the fifth was to take only the income of her share for life, her children taking the remainder. "The entire estate was in contemplation of the law personalty, the legal title to which was vested in the executors to accomplish the purposes of the will."—*Manhattan State Bank v. Hald*, 97 Kan. 297, 155 Pac. 57.

24. **Charge upon land.**—If land is specifically devised and the will directs the devisee to pay a legacy provided therein the law will impliedly charge such legacy upon the land taken by the devisee, even though such legacy is not expressly charged thereon by the will.—*Dixon v. Helena Society, etc.* (Okla.), 166 Pac. 114.

25. **Advancements.**—Where the books of a testator contain entries of money paid from time to time to a daughter, and of the return of these payments, the daughter can not be made to testify that there were no such repayments, so that her legacy may be cut down, when the will directs no such use of the books; even though the will does express a desire that there shall be an even distribution.—*Estate of Vanderhurst*, 171 Cal. 553, 154 Pac. 5. A testator who in his will directs that his books of account be consulted to ascertain the advances made to certain legatees and their deceased father, does not thereby direct these books be searched for evidence of advances made to other legatees.—*Estate of Vanderhurst*, 171 Cal. 553, 555, 154 Pac. 5.

26. **Relief against mistake.**—Relief will not be granted against a mistake in the construction of a will where that relief must be given at the expense of non-resident minors, beneficiaries under the will, who had nothing to do with the mistake and whose interests can not be adequately protected by any judgment that the courts of this state can render.—*Terry v. Miller*, 100 Kan. 324, 164 Pac. 151. There is no law in Kansas for the emendation or correction of a will.—*Martin v. Martin*, 93 Kan. 714, 145 Pac. 565.

27. **Evidence.**—In a case which involves the construction of a will made by a testatrix, it is not error to exclude evidence of her statements to the scrivener that she wanted each of the devisees to share equally with the others.—*Neil v. Stuart*, 102 Kan. 242, 169 Pac. 1138.

28. **Agreement not to contest will.**—If there has been a bequest to a municipality, and a relative of the testator has threatened to contest the will, an agreement by the former to give a portion of the bequest to the latter, in case there shall be no contest, becomes void upon the beginning of a contest by a third person, the reason of such agreement being avoidance of delay in the distribution.—*Estate of Land, Land v. Evans*, 178 Cal. 296, 173 Pac. 387.

29. **Forfeiture in case of contest.**—While it is the rule in California that a clause in a will providing for a forfeiture in case of contest is valid and is to be given effect according to the intent of the testator, yet, it is also the rule, and a salutary one, that such a provision, being by way of forfeiture and condition subsequent, is to be strictly construed and not extended beyond what was plainly the testator's intent.—*In re Bergland's Estate* (Cal.), 182 Pac. 277, 279. If a will contains a provision whereby a beneficiary under it shall, by contesting it, forfeit the benefit, such provision does not apply to a beneficiary who, being the custodian of a later and inconsistent will by the same testator, produces this and proposes it for probate.—*Estate of Bergland*, 177 Cal. 227, 170 Pac. 400. The question of forfeiture of benefit, by a beneficiary of a will, through having contested the instrument, arises on distribution, and not on a petition to probate.—*Estate of Bergland*, 177 Cal. 227, 170 Pac. 400.

30. **Nuncupative wills.**—All contracts conveying real property, or evidencing any interest therein, must be in writing; wills are not exceptions to the rule, and, therefore, there can be no nuncupative will of real estate.—*Irwin v. Rogers*, 91 Wash. 284, L. R. A. 1916E, 1130, 157 Pac. 690. The nuncupative will statute of the state of Washington was taken almost verbatim from the English nuncupative will statute, which, at the time of the enactment of the Washington statute, had been uniformly construed to exclude real estate.—*Irwin v. Rogers*, 91 Wash. 284, L. R. A. 1916E, 1130, 157 Pac. 690. The statute, defining who may devise, has not, by omitting to add, "in writing," after the words, "every person may by last will," changed the settled law of nuncupative wills, under which real estate is not allowed to be the subject of such wills.—*Irwin v. Rogers*, 91 Wash. 284, L. R. A. 1916E, 1130, 157 Pac. 690. Under the laws of New Mexico, adopted from the Spanish laws and still prevailing, real estate may validly be the subject of a nuncupative will.—*Plomteaux v. Solano* (N. M.), 176 Pac. 77.

31. **Foreign wills.**—In construing a foreign will, in the absence of a contrary showing, to be gathered from the circumstances surrounding the testator, or from the instrument as a whole, the sense of words used by him is to be ascertained in the light of the law of his domicile.—*Keith v. Eaton*, 58 Kan. 732, 51 Pac. 271, 272. A will executed in the territory of New Mexico, while it was a portion of the republic of Mexico, in accordance with prevailing customs and usages in that territory, having the force of law, though not in accordance with the laws of Mexico, will be given effect as a valid will, *ex necessitate rei*, in the courts of New Mexico.—*Gildersleeve v. New Mexico Min. Co.*, 6 N. M. 27, 27 Pac. 318, 322; and see cases cited in opinion for application of rule in other jurisdictions.

REFERENCES.

Foreign wills.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1285. Foreign will construed as giving a life interest in a mortgage.—*Crandall v. Barker*, 8 N. D. 263, 78 N. W. 347. Foreign will construed as giving absolute ownership of a mortgage.—*Knox v. Barker*, 8 N. D. 272, 78 N. W. 352. Conflict of laws as to wills.—See note 2 L. R. A. (N. S.) 408-468. Laws governing validity and interpretation of wills.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1376.

CHAPTER III.

GENERAL PROVISIONS RELATING TO LEGACIES AND WILLS.

- § 936. Nature and designation of legacies.
- § 937. Estates chargeable.
- § 938. Order of resort to estate for debts.
- § 939. Same. For legacies.
- § 940. Same. Legacies to kindred.
- § 941. Abatement.
- § 942. Specific devise or legacy.
- § 943. Heir's conveyance good, unless will is proved within four years.
- § 944. Possession of legatees.
- § 945. Bequest of interest.
- § 946. Satisfaction.
- § 947. Legacies, when due.
- § 948. Interest.
- § 949. Construction of these rules.
- § 950. Executor according to the tenor.
- § 951. Power to appoint is invalid when.
- § 952. Executor not to act till qualified.
- § 953. Provisions as to revocations.
- § 954. Execution and construction of prior wills not affected.
- § 955. Law governing validity and interpretation of wills.
- § 956. Liability of beneficiaries for testator's obligations.

PROPERTY PASSING BY WILL. VESTING OF INTERESTS.

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| 10. Ademption and abatement. | (8) Election by acceptance of devise. |
| 11. Advancements or gifts. | (9) Election by acts in pais. |
| 12. Application of legacies to payment of debts. | 23. Vesting and divesting of estates. |
| 13. Future interests. | (1) In general. |
| 14. Preferred legatees. | (2) Intention of the testator. |
| 15. Creditor as legatee. | (3) As to expectancies. |
| 16. Conditional and contingent devises. | (4) Property under contract of sale. |
| 17. Accumulations. | (5) Property subject to trust. |
| 18. Annuities. | (6) Deeds and deeds in escrow. |
| 19. Beneficiaries of benefit certificates. | (7) Remainders. |
| 20. After-acquired property. | (8) Contingent remainders. |
| 21. Community property. | (9) Lapsed legacies and devises. |
| 22. Election by widow. | (10) Altered circumstances. |
| (1) In general. | (11) Forfeiture of legacies. |
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| (3) Family allowance. | (1) In general. |
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| (6) Effect of election. | (4) Charge upon estate. |
| (7) Election under mistake or misapprehension. | (5) Right to income, rents, and profits. |
| | (6) Disposition of excess. |
| | 25. Descent and distribution. |
| | (1) In general. |

§ 936. Nature and designation of legacies.

Legacies are distinguished and designated, according to their nature, as follows:

1. A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort can not be had to the other property of the testator;

2. A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid; if such fund or property fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy;

3. An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets, as in case of a general legacy;

4. A residuary legacy embraces only that which remains after all the bequests of the will are discharged;

5. All other legacies are general legacies.—*Kerr's Cyc. Civ. Code*, § 1357.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4798.

North Dakota*—Compiled Laws of 1913, section 5720.

Oklahoma*—Revised Laws of 1910, section 8317.

South Dakota*—Compiled Laws of 1913, section 3378.

Utah*—Compiled Laws of 1907, section 2802.

§ 937. Estates chargeable.

When a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided in this code and the Code of Civil Procedure.—*Kerr's Cyc. Civ. Code*, § 1358.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho*—Compiled Statutes of 1919, section 7834.

Montana*—Revised Codes of 1907, section 4799.

North Dakota*—Compiled Laws of 1913, section 5721.

Oklahoma*—Revised Laws of 1910, section 8318.

South Dakota*—Compiled Laws of 1913, section 3379.

Utah*—Compiled Laws of 1907, section 2803.

§ 938. Order of resort to estate for debts.

The property of a testator, except as otherwise specially provided in this code and the Code of Civil Procedure, must be resorted to for the payment of debts, in the following order:

1. The property which is expressly appropriated by the will for the payment of the debts;
2. Property not disposed of by the will;
3. Property which is devised or bequeathed to a residuary legatee;
4. Property which is not specifically devised or bequeathed, and,
5. All other property ratably. Before any debts are paid, the expenses of the administration, and the allowance to the family, must be paid or provided for.—*Kerr's Cyc. Civ. Code*, § 1359.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Idaho*—Compiled Statutes of 1919, section 7835.
 Montana*—Revised Codes of 1907, section 4800.
 North Dakota*—Compiled Laws of 1913, section 5722.
 Oklahoma*—Revised Laws of 1910, section 8319.
 South Dakota*—Compiled Laws of 1913, section 3380.
 Utah*—Compiled Laws of 1907, section 2804.

§ 939. Same. For legacies.

The property of a testator, except as otherwise specially provided in this code and the Code of Civil Procedure, must be resorted to for the payment of legacies, in the following order:

1. The property which is expressly appropriated by the will for the payment of the legacies.
 2. Property not disposed of by the will.
 3. Property which is devised or bequeathed to a residuary legatee.
 4. Property which is specifically devised or bequeathed.
- Kerr's Cyc. Civ. Code*, § 1360.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Idaho*—Compiled Statutes of 1919, section 7836.
 Montana*—Revised Codes of 1907, section 4801.
 North Dakota*—Compiled Laws of 1913, section 5723.
 Oklahoma*—Revised Laws of 1910, section 8320.
 South Dakota*—Compiled Laws of 1913, section 3381.
 Utah*—Compiled Laws of 1907, section 2807.

§ 940. Same. Legacies to kindred.

Legacies to husband, widow, or kindred of any class are chargeable only after legacies to persons not related to the testator.—*Kerr's Cyc. Civ. Code*, § 1361.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Idaho*—Compiled Statutes of 1919, section 7837.
 Montana*—Revised Codes of 1907, section 4802.
 North Dakota*—Compiled Laws of 1913, section 5724.
 Oklahoma*—Revised Laws of 1910, section 8321.
 South Dakota*—Compiled Laws of 1913, section 3382.
 Utah*—Compiled Laws of 1907, section 2808.

§ 941. Abatement.

Abatement takes place in any class only as between legacies of that class, unless a different intention is expressed in the will.—*Kerr's Cyc. Civ. Code*, § 1362.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4803.

North Dakota*—Compiled Laws of 1913, section 5725.

Oklahoma*—Revised Laws of 1910, section 8322.

South Dakota*—Compiled Laws of 1913, section 3383.

Utah*—Compiled Laws of 1907, section 2809.

§ 942. Specific devise or legacy.

In a specific devise or legacy, the title passes by the will, but possession can only be obtained from the personal representative; and he may be authorized by the superior court to sell the property devised and bequeathed in the cases herein provided.—*Kerr's Cyc. Civ. Code*, § 1363.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho*—Compiled Statutes of 1919, section 7838.

Montana*—Revised Codes of 1907, section 4804.

North Dakota*—Compiled Laws of 1913, section 5726.

Oklahoma*—Revised Laws of 1910, section 8323.

South Dakota*—Compiled Laws of 1913, section 3384.

Utah*—Compiled Laws of 1907, section 2810.

§ 943. Heir's conveyance good, unless will is proved within four years.

The rights of a purchaser or incumbrancer of real property, in good faith and for value, derived from any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless within four years after the deviser's death, the instrument containing such devise is duly proved as a will, and recorded in the office of the clerk of the superior court having jurisdiction thereof, or written notice of such devise is filed with the clerk of

the county where the real property is situated.—*Kerr's Cyc. Civ. Code*, § 1364.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Kansas—General Statutes of 1915, section 11806.

Montana*—Revised Codes of 1907, section 4805.

North Dakota—Compiled Laws of 1913, section 5727.

Oklahoma*—Revised Laws of 1910, section 8324.

South Dakota—Compiled Laws of 1913, section 3385.

Utah—Compiled Laws of 1907, section 2811.

§ 944. Possession of legatees.

Where specific legacies are for life only, the first legatee must sign and deliver to the second legatee, or, if there is none, to the personal representative, an inventory of the property, expressing that the same is in his custody for life only, and that, on his decease, it is to be delivered and to remain to the use and for the benefit of the second legatee, or to the personal representative, as the case may be.—*Kerr's Cyc. Civ. Code*, § 1365.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4806.

North Dakota*—Compiled Laws of 1913, section 5728.

Oklahoma*—Revised Laws of 1910, section 8325.

South Dakota*—Compiled Laws of 1913, section 3386.

Utah*—Compiled Laws of 1907, section 2812.

§ 945. Bequest of interest.

In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death.—*Kerr's Cyc. Civ. Code*, § 1366.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4807.

North Dakota*—Compiled Laws of 1913, section 5729.

Oklahoma*—Revised Laws of 1910, section 8326.

South Dakota*—Compiled Laws of 1913, section 3387.

Utah*—Compiled Laws of 1907, section 2813.

§ 946. Satisfaction.

A legacy, or a gift in contemplation, fear, or peril of death, may be satisfied before death.—*Kerr's Cyc. Civ. Code*, § 1367.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4808.

North Dakota*—Compiled Laws of 1913, section 5730.

Oklahoma*—Revised Laws of 1910, section 8327.

South Dakota*—Compiled Laws of 1913, section 3388.

Utah*—Compiled Laws of 1907, section 2814.

§ 947. Legacies, when due.

Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease.—*Kerr's Cyc. Civ. Code*, § 1368.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho*—Compiled Statutes of 1919, section 7839.

Montana*—Revised Codes of 1907, section 4809.

North Dakota*—Compiled Laws of 1913, section 5731.

Oklahoma*—Revised Laws of 1910, section 8328.

South Dakota*—Compiled Laws of 1913, section 3389.

Utah*—Compiled Laws of 1907, section 2815.

§ 948. Interest.

Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease.—*Kerr's Cyc. Civ. Code*, § 1369.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4810.

North Dakota*—Compiled Laws of 1913, section 5732.

Oklahoma*—Revised Laws of 1910, section 8329.

South Dakota*—Compiled Laws of 1913, section 3390.

Utah*—Compiled Laws of 1907, section 2816.

§ 949. Construction of these rules.

The four preceding sections are in all cases to be controlled by a testator's express intention.—*Kerr's Cyc. Civ. Code*, § 1370.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4811.

North Dakota*—Compiled Laws of 1913, section 5733.

Oklahoma*—Revised Laws of 1910, section 8330.

South Dakota*—Compiled Laws of 1913, section 3391.

Utah*—Compiled Laws of 1907, section 2817.

§ 950. Executor according to the tenor.

Where it appears, by the terms of a will, that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor.—*Kerr's Cyc. Civ. Code*, § 1371.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana—Revised Codes of 1907, section 4812.

North Dakota*—Compiled Laws of 1913, section 5734.

Oklahoma*—Revised Laws of 1910, section 8331.

South Dakota*—Compiled Laws of 1913, section 3392.

Utah*—Compiled Laws of 1907, section 2818.

§ 951. Power to appoint is invalid, when.

An authority to an executor to appoint an executor is void.—*Kerr's Cyc. Civ. Code*, § 1372.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4813.

North Dakota*—Compiled Laws of 1913, section 5735.

Oklahoma*—Revised Laws of 1910, section 8332.

South Dakota*—Compiled Laws of 1913, section 3393.

Utah*—Compiled Laws of 1907, section 2819.

§ 952. Executor not to act till qualified.

No person has any power, as an executor, until he qualifies, except that, before letters have been issued, he

may pay funeral charges and take necessary measures for the preservation of the estate.—*Kerr's Cyc. Civ. Code*, § 1373.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Colorado—Mills's Statutes of 1912, section 7937.

Idaho*—Compiled Statutes of 1919, section 7840.

Kansas*—General Statutes of 1915, section 4495.

Montana*—Revised Codes of 1907, section 4814.

North Dakota*—Compiled Laws of 1913, section 5736.

Oklahoma*—Revised Laws of 1910, section 8333.

South Dakota*—Compiled Laws of 1913, section 3394.

Utah*—Compiled Laws of 1907, section 2820.

§ 953. Provisions as to revocations.

The provisions of this title in relation to the revocation of wills apply to all wills made by any testator living at the expiration of one year from the time it takes effect.—*Kerr's Cyc. Civ. Code*, § 1374.

§ 954. Execution and construction of prior wills not affected.

The provisions of this title do not impair the validity of the execution of any will made before it takes effect, or affect the construction of any such will.—*Kerr's Cyc. Civ. Code*, § 1375.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4815.

Utah—Compiled Laws of 1907, section 2821.

§ 955. Law governing validity and interpretation of wills.

The validity and interpretation of wills, wherever made, are governed, when relating to property within this state, by the law of this state, except as provided in section twelve hundred and eighty-five.—*Kerr's Cyc. Civ. Code*, § 1376.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 576; Laws of 1913, chapter 61, page 155.

Idaho—Compiled Statutes of 1919, section 7841.
 Montana—Revised Codes of 1907, section 4816.
 North Dakota—Compiled Laws of 1913, section 5739.
 Oklahoma—Revised Laws of 1910, section 8336.
 Oregon—Lord's Oregon Laws, section 7332.
 South Dakota—Compiled Laws of 1913, section 3397.
 Utah—Compiled Laws of 1907, section 2822.

§ 956. Liability of beneficiaries for testator's obligations.

Those to whom property is given by will are liable for the obligations of the testator in the cases and to the extent prescribed by the Code of Civil Procedure.—*Kerr's Cyc. Civ. Code*, § 1377.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4817.
 North Dakota—Compiled Laws of 1913, section 5740.
 Oklahoma—Revised Laws of 1910, section 8337.

PROPERTY PASSING BY WILL. VESTING OF INTERESTS.

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- 23. Vesting and divesting of estates.
 - (1) In general.
 - (2) Intention of the testator.
 - (3) As to expectancies.
 - (4) Property under contract of sale.
- (5) Property subject to trust.
- (6) Deeds and deeds in escrow.
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- (8) Contingent remainders.
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- 25. Descent and distribution.
 - (1) In general.

1. Of devises and bequests.

(1) In general.—At the time of executing a will the testator must have testamentary capacity; he must know and understand what he is about.—*Points v. Nier*, 91 Wash. 20, Ann. Cas. 1918A, 1046, 157 Pac. 44. A legacy to one who is dead at the time of the execution of the will is void.—*Estate of Matthews*, 176 Cal. 576, 169 Pac. 233. It is the rule rather than the exception, that a bequest to an executor is deemed to be to him in his official capacity.—*Beakey v. Knutson*, 90 Or. 574, 174 Pac. 1149, 177 Pac. 955. The interest of a devisee in real estate is subject to attachment although the will directs the executor to sell the property and distribute the proceeds among the devisees.—*Ward v. Benner*, 89 Kan. 369, 131 Pac. 609. If a testator sets apart, from his estate, a certain amount of money, for his funeral expenses, proper interment of his remains, and a suitable monument to his memory, and a portion of the money is used in the erection of a granite monument at his tomb, the remainder of the bequest can not be devoted to the maintenance of a building to be dedicated to the purposes of a free library, in memory of the deceased, as a memorial building is without the purview of such bequest.—*Fancher v. Fancher*, 156 Cal. 13, 19 Ann. Cas. 1157, 103 Pac. 206. A decree of distribution is final and conclusive as to legacies. They should be obtained through the probate court, before distribution, and the decree is, as to them, a complete bar.—*Hill v. Den*, 54 Cal. 6, 23. If an executor is held personally liable for losses arising from investments of trust funds on insufficient security, but has title to the property taken as such security, the legatee must quitclaim to him as a condition precedent to his paying such losses.—*In re Roach's Estate*, 50 Or. 179, 92 Pac. 118, 127. It is a rule that a condition or direction imposed on a devisee to pay a sum of money enlarges the devise to him, without words of limitation, into an absolute estate in fee.—*Donohue v. Donohue*, 54 Kan. 136, 37 Pac. 998, 999. The presentation of a claim against an estate of a deceased person does not estop such claim-

ant from claiming as a legatee under the will of the deceased, by which it was clearly the intention of the testator to make a gift to the legatee, and to require its payment before any distribution had to residuary devisees or legatees.—Estate of Barclay, 152 Cal. 753, 93 Pac. 1012, 1014.

REFERENCES.

Advancements to heirs, doctrine of.—See notes 12 L. R. A. 566-570. Bequests to class as including persons dead before making of will.—See note 5 Am. & Eng. Ann. Cas. 243. Capacity of corporation to take by will.—See note 2 Prob. Rep. Ann. 674-679, and notes 18 Am. Dec. 541; 80 Am. Dec. 315. Corporations, devise to.—See notes 18 Am. Dec. 541; 80 Am. Dec. 315. Right to question power of corporation to take by will property in excess of its charter authority.—See note 9 L. R. A. (N. S.) 689, 690. Right to contest power of corporation to take or hold property.—See notes 32 L. R. A. 293-297, 60 Am. St. Rep. 318, 321. Construction, validity, and effect of devises and legacies.—See notes 2 L. R. A. 175-177, 10 L. R. A. 816-818, 11 L. R. A. 185. Lands, profits, income, etc., of land, estate passing by devise of.—See note 9 Am. & Eng. Ann. Cas. 247. Municipal corporations as legatees or devisees.—See note 4 Prob. Rep. Ann. 113-116. Consult notes to the following sections of Kerr's Cal. Cyc. Civ. Code as to the matters indicated: Legacies controlled by testator's intention, § 1370; legacies, specific, demonstrative, annuities, residuary, and general, § 1357; capacity to take by will, § 1275; power to devise, how executed under the will, § 1330; land, devises of, how construed, § 1311; witness as devisee, when gift to, void, §§ 1282, 1283; devise or bequest of all real or personal property, or both, what passes by, § 1331; class, devise or bequest to, § 1337. Succession and distribution of property of intestates.—See note Kerr's Cal. Cyc. Civ. Code, § 1386. Effect of meretricious relations between testator and beneficiary on validity of devise or bequest.—See note 17 L. R. A. (N. S.) 476-481. Power of disposition bestowed on devisee as indicative of quantum of estate intended to be devised, 18 L. R. A. (N. S.) 463-471. Devise or bequest of property in which testator had but a part interest as putting co-owner who is a beneficiary to his election.—See note 30 L. R. A. (N. S.) 644. As to whether beneficiary may be put to his election by extrinsic evidence of testator's intention.—See note 28 L. R. A. (N. S.) 657.

(2) Certain words mean what.—While the terms "legacy" and "bequest" refer to gifts by will of personal estate, they are not always employed according to their technical meaning, and are not always to be so construed.—Logan v. Logan, 11 Colo. 44, 17 Pac. 99, 100. Use of the words "bequest," "legacy," "bequeath," "devise."—See *In re Campbell's Estate*, 27 Utah 361, 75 Pac. 851, 853. The word "legacy" is used to denote a gift by will of personalty in general.—*In re Campbell's Estate*, 27 Utah 361, 75 Pac. 851, 853. A devise of the "absolute use and control of the rest and residue of my property," to the wife, "for her comfort and support," etc., held to be a devise for the "use" and not for

the consumption of the money or other property covered by the bequest.—*Leahy v. Cardwell*, 14 Or. 171, 173, 12 Pac. 307. Devises, not grammatically connected, nor united by the expression of a common purpose, must be construed separately, and without relation to each other, or to the words of limitation which follow. Hence, in a will loosely drawn, the words "to have and hold during her natural life" have been held to qualify only the last preceding gift of devise or bequest.—*Boston Safe, etc., Co. v. Stich*, 61 Kan. 474, 59 Pac. 1082, 1083.

(3) **Common-law distinctions abrogated.**—Section 1332 of the California Civil Code abrogates the rule of the common law, which made a distinction between devises of real property and bequests of personal property; the former, speaking from the death of the testator, and the latter, from the date of the will. It is the accepted rule in that state that, where there is a valid general residuary devise, real property mentioned in a lapsed or void devise, goes to the residuary devisee, and not to the heirs, unless a contrary intent is clearly expressed by the terms of the will.—*Estate of Russell*, 150 Cal. 604, 89 Pac. 345; *Estate of Upham*, 107 Cal. 90, 59 Pac. 315; *O'Connor v. Murphy*, 147 Cal. 148, 81 Pac. 406.

(4) **Particular description as a limitation.**—A particular description in a will of real property, owned by the testator at the time of the execution of the will, which follows a general devise of all real and personal property, is not intended as a limitation upon the preceding grant, and such will disposes of all of the real estate of which the testator died seised.—*Durboraw v. Durboraw*, 67 Kan. 139, 72 Pac. 566, 567.

(5) **Substitution of land for legacy. Election.**—If a person is authorized by will to substitute for legacies certain land of the value of such legacies, or to invest the money for the legatees in lands of that value, he should exercise his election within a reasonable time. He is not ordinarily entitled to wait until a final distribution of the estate before making such election.—*Dunne v. Dunne*, 66 Cal. 157, 4 Pac. 441, 443, 1152.

REFERENCES.

Conversion of real property into money, effect of, when directed to be made by the will.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1338.

(6) **Executor may purchase legacy.**—The Oregon statute prohibits the administrator of an estate from purchasing the property of the estate at his own sale; but such statute does not prohibit the administrator from purchasing a legacy bequeathed by the deceased, where the transaction appears to be fair, and is grounded upon an adequate consideration.—*Lombard v. Carter*, 36 Or. 266, 59 Pac. 473.

(7) **Shares of stock appurtenant to lands.**—By a decree of distribution, there was distributed as appurtenant to land devised, certain shares of stock in a water company, which company provided water for irrigating the lands; held, that the stock was appurtenant, as a right

to so much water, to the land, and consequently, devisable as real property.—*Estate of Thomas*, 147 Cal. 236, 81 Pac. 539, 541.

(8) **Devise to unnamed heirs.**—As a general rule, under a devise to heirs, without naming them, which therefore necessarily compels a reference to the statute of distribution to ascertain who shall take under the will, the devisees will take in the proportion prescribed by the statute, and, if not of equal degree, they will take, in the absence of a direction in the will to the contrary, or in case the intention of the testator is in doubt, by right of representation, or per stirpes, and not per capita. But when the testator prescribes the mode of distribution, there is no room for presumption, and it must be made as he directs.—*Ramsey v. Stephenson*, 34 Or. 408, 56 Pac. 520.

REFERENCES.

Gifts by will designating no donee.—See note 80 Am. Dec. 314.

(9) **Devise of all of property.**—A devise of real property is a devise of all the testator's real property unless it clearly appears from the will that the devise of a lesser estate or interest was intended.—*Irvine v. Irvine*, 69 Or. 187, 191, 136 Pac. 18. Instance of a will giving to the testator's wife the entire fee, with full power to sell or mortgage.—*Bilger v. Nunan*, 199 Fed. 549, 560, 118 C. C. A. 23. Where the statutes of a state provide that every devise of real property shall be construed to convey all the testator's estate, unless it clearly appears that testator intended to convey a lesser estate, a request to a devisee to devise and bequeath "whatever remains" of the property at the death of such devisee is ineffective, where by a prior paragraph of the will all the estate the testator could devise was conveyed to the devisee with absolute power of disposition.—*Wells v. Brown (Okla.)*, 255 Fed. 852, 853, 854.

(10) **Acceptance or renunciation of devise.**—A devisee is presumed to accept a devise favorable to him, and if he desire to renounce he should do so within a reasonable time.—*Strom v. Wood*, 100 Kan. 556, 558, 164 Pac. 1100. A will devising lands in fee simple, without restrictions or limitations, containing a clause directing the devisee of such lands to pay a legacy, does not technically create a trust for the benefit of the legatee, but, upon the acceptance of the devise, such legacy becomes a personal liability of the devisee, and also becomes a lien upon the lands devised.—*Dixon v. Helena Society, etc. (Okla.)*, 166 Pac. 114. The acceptance by a devisee of property given to him by the will, charged with a payment therefrom of a certain sum of money, imposes upon the devisee a personal liability for the payment as directed by the will. As soon as the liability accrued, if it was not performed within a reasonable time, the beneficiary became entitled to bring an action to recover the money of the devisee, and to have his claim declared a lien on the property devised.—*Keir v. Keir*, 155 Cal. 96, 99 Pac. 487. Where executions on a judgment against a testator, recovered in his lifetime, four years after the probate of his will, and the

same was levied on devisee's interest under the will a year later, it was held that it was too late to file his disclaimer, and that it was presumed that he had, by non-action and lapse of time, accepted the devise which had already for years been subject to the lien of the judgment.—*Strom v. Wood*, 100 Kan. 556, 558, 164 Pac. 1100, 1101. A renunciation by the beneficiary of a devise in a will, if made within a reasonable time, relates back to the death of the testator.—*Strom v. Wood*, 100 Kan. 556, 558, 164 Pac. 1100, 1101.

REFERENCES.

"Estate" when testamentary gift is to be restricted to personalty.—See note 3 Am. & Eng. Ann. Cas. 420. Devise of fee in lands, words which will pass.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1329. Mode and effect of renouncing benefit under will.—See note 19 L. R. A. (N. S.) 595-597.

2. General legacies.—A general legacy is one which is payable out of the general assets of a testator's estate, such as a gift of money or other thing in quantity, and not in any way separated or distinguished from the other things of like kind.—*Nusly v. Curtiss*, 36 Colo. 464, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134, 7 L. R. A. (N. S.) 592, 85 Pac. 846, 847. See *Estate of Woodworth*, 31 Cal. 595, 602. Whether a testamentary gift is specific or general, is to be determined by the same tests, where the subject of the gift is real, as where it is personal, property.—*Estate of Painter*, 150 Cal. 498, 11 Ann. Cas. 760, 89 Pac. 98, 100. A bequest or a devise of the residue of an estate is general, where such residue is not ascertainable at the time the will is made.—*Estate of Painter*, 150 Cal. 498, 11 Ann. Cas. 760, 89 Pac. 98, 100. A legacy is said to be general when it is not answered by any particular portion thereof, or article belonging to the estate, the delivery of which alone will fulfill the intent of the testator.—*In re Hawgood's Estate*, 37 S. D. 565, 578, 159 N. W. 117. A bequest of personal property in gross or in bulk, which will include any personal property generally, is a general and not a specific legacy.—*In re Hawgood's Estate*, 37 S. D. 565, 578, 159 N. W. 117. The question whether a testamentary gift is specific or general is determined by the same tests where the property is real as where it is personal property.—*Estate of De Bernal*, 165 Cal. 223, Ann. Cas. 1914D, 26, 131 Pac. 375. The effect of a testator's words, such as "I give and devise to my wife, —, all my household goods and personal property whatever, except my right, title, and interest in and to my mines and mining property," is to make a specific legacy of only the household goods and a general legacy of all other personal property, exclusive of the mining property.—*In re Hawgood's Estate*, 37 S. D. 565, 578, 159 N. W. 117.

REFERENCES.

Is bequest of stocks, bonds, or notes general or specific.—See note 11 L. R. A. (N. S.) 49-87. As to what constitutes a specific legacy, see subd. 3, *infra*.

3. **Specific legacies.**—A specific legacy is a gift by will of a specific article, or a particular part of the testator's estate, which is identified and distinguished from all others of the same nature, and which is to be satisfied only by the delivery and receipt of the particular thing given.—*Nusly v. Curtiss*, 36 Colo. 464, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134, 7 L. R. A. (N. S.) 592, 85 Pac. 846, 847. See definitions in *Estate of Woodworth*, 31 Cal. 595, 601; *In re Campbell's Estate*, 27 Utah 361, 75 Pac. 851, 853. A specific legacy is a bequest of a particular or specified article of personal property distinguished from all other articles of personal property belonging to the testator. Instances of specific legacies given, and the terms of a legacy stated, which do not bring it within the foregoing definition.—*Adair v. Adair*, 11 N. D. 175, 90 N. W. 804. Where the description of a bequest is particular enough to identify the subject-matter of the testamentary gift and to evince the testator's intention to vest the title in the trustees named, the bequest is specific, and the property is exonerated from liability on account of the debts of decedent until a resort thereto becomes necessary by reason of a failure to discharge obligations of the estate from the proceeds of the sales of the remaining property, not specifically devised or bequeathed.—*In re Noon's Estate*, 49 Or. 286, 88 Pac. 673. A devise of a conditional life estate in a homestead, is a special bequest, and can not be taken into account in adjusting matters in proceedings for an accounting as to moneys alleged to belong to the estate.—*Haines v. Christy*, 28 Colo. 502, 66 Pac. 883, 887. Where bank stock has been bequeathed, and is to be sold by the executors, and the proceeds divided among the legatees named, the legacies are not merely demonstrative,—they are specific; and legacies given by a codicil to the will are not "advancements."—*Estate of Zelle*, 74 Cal. 125, 130, 15 Pac. 455. Where the testator gave and bequeathed "the sum of \$500 and all other personal property of which I may die possessed," this did not carry a bequest of all the moneys of the estate over the sum of five hundred dollars.—*Estate of Smith*, 6 Cal. App. Dec. 81, 83 (Jan. 2, 1908). Where the language used indicates the intention to make two distinct gifts, one of specific property, and the other of the residue, a specific legacy or devise is not rendered general by the fact that there is a gift of the residue to the same person.—*Estate of Painter*, 150 Cal. 498, 11 Ann. Cas. 760, 89 Pac. 98, 100. In an inquiry whether a legacy is to be regarded as specific, rather than demonstrative or general, the entire will should be considered.—*Collar v. Garn* (Colo.), 171 Pac. 63. A direction in a will to the executors "to proceed to obtain the sum of \$5000 from" the share of the testatrix in the estate of her deceased father, "and place it in the care of the Methodist Episcopal conference, said conference being pledged never to use said \$5000, except as part of an endowment fund for a school for methodist ministers," constitutes a specific legacy, and is deemed by the receipt of the share long prior to the death of the testatrix.—*Estate of Goodfellow* (*McKee v. California A. C. of M. E. Church*),

166 Cal. 409, 137 Pac. 12. A devise to grandchildren, share and share alike, of five acres in a tract of twenty-five acres, in which the testatrix owned an undivided three-fourths interest, is a specific gift, and entitled to exemption from debts and expenses of administration under section 1563 of the Code of Civil Procedure of California.—Estate of De Bernal, 165 Cal. 223, Ann. Cas. 1914D, 26, 131 Pac. 375. Where a testator, referring in his will to the stock of a named corporation, bequeaths to a particular person "all of the stock which I may own at the time of my death," the words result in a specific bequest.—In re Wilson's Estate, 85 Or. 604, 167 Pac. 580; Mackin v. Noad, 86 Or. 221, 167 Pac. 585. If a man makes a specific legacy to his niece, payable "each and every month during the life of" his wife, and the wife survives him, the legacy dates from the death of the testator, and not from the settlement of the estate.—Jesseph v. Westerberg, 94 Wash. 602, 162 Pac. 1004. Where a will expressed that it was the first desire of the legatee's heart to provide for an elderly cousin "so that she may be relieved from anxiety in her old age," and directed his executor to purchase any mortgage that may be on her property and hold it in trust for his niece, and to improve the property by the expenditure of \$5000, including the mortgage, which was to run for her lifetime, and authorized his executor to sell a sufficient number of shares of a certain mining stock, whenever it could be sold for not less than half its par value, it was held that such provision for the elderly cousin was not a specific bequest of the mining stock, but that it was a charge upon the whole estate.—School District v. International Trust Co., 59 Colo. 486, 495, 149 Pac. 620. Where personal property specifically bequeathed is destroyed by fire during the progress of administration the insurance money collected on account of the loss belongs to the legatee.—Estate of Robb, 163 Cal. 801, Ann. Cas. 1914A, 319, 127 Pac. 55.

REFERENCES.

Consult notes to the following sections of Kerr's Cal. Civ. Code, as to the matters indicated: Bequest of interest or income of a certain fund, income accrues thereon from testator's death, § 1366; specific legacies for life, delivery of inventory of property to second legatee, § 1365; title to specific devises and legacies passes by will, possession only in personal representative, § 1363. Specific legacies.—See, also, subd. 2, *supra*.

4. **Demonstrative and cumulative legacies.**—A demonstrative legacy partakes both of the nature of a general and specific legacy. It is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund or evince an intent to relieve the general estate from liability in case the fund fails.—Nusly v. Curtiss, 36 Colo. 464, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134, 7 L. R. A. (N. S.) 592, 85 Pac. 846, 847. Where a testator gives a legacy of quantity, simpliciter, and also a second legacy of quantity to the same legatee, the second legacy is regarded as cumulative, and not as substitutionary, unless the language of the

second will or codicil shows an intent to the contrary.—*Estate of Zeile*, 74 Cal. 125, 131, 15 Pac. 455. Where the testator points out the particular fund from which money is to be given to his wife, this constitutes a demonstrative legacy to her.—*In re Hawgood's Estate*, 37 S. D. 565, 579, 159 N. W. 117. Considering the various paragraphs of the will in this case, one with the other, the bequest therein of a note was considered demonstrative in character, not specific; and it was held that part payment of the note, and exchange by the testator of the note, with such part payment indorsed thereon, for certain bonds, did not extinguish the legacy, but that the legatee was entitled to have it satisfied out of the estate of the deceased.—*Collar v. Gaarn* (Colo.), 171 Pac. 63. Court inquires into a legacy for the purpose of determining from all the facts, validly to be considered, whether it was specific or demonstrative.—*Collar v. Gaarn* (Colo.), 171 Pac. 63. The fact that by a subsequent clause of the will legacies aggregating \$1500 were charged upon the proceeds of the property devised, payable at the death of the wife does not compel the conclusion that the testator supposed that his son William, if he were living, would then have an indefeasible fee and that he must have intended that result.—*Estate of Carothers*, 161 Cal. 588, 119 Pac. 926. A devise to grandchildren, share and share alike, of five acres in a tract of twenty-five acres in which the testatrix owned an undivided three-fourths interest, constitutes a gift of an undivided interest of full five acres rather than simply an undivided three-fourths of five acres.—*Estate of De Bernal*, 165 Cal. 223, Ann. Cas. 1914D, 26, 131 Pac. 375.

REFERENCES.

The subject of specific demonstrative and general bequests is treated copiously in the note to *Kearns v. Kearns*, 140 Am. St. Rep. 577-614.

5. **Additional or substitutional legacies.**—It has become well established that additional or substitutional legacies given by a codicil are held to be attended by the same incidents and conditions as were the legacies given originally by the will.—*Estate of Cross*, 163 Cal. 778, 127 Pac. 70.

6. Life estates.

(1) **In general.**—A devise of land to the son of the testatrix, on condition that he shall not sell it during his lifetime and that after his death it shall go to his heirs, clearly expresses the intention of the testatrix to devise to her son a life estate in such land, instead of an absolute title in fee simple.—*Banks v. Watkins* (Kan.), 181 Pac. 608. A widow has no interest, under the statute of Kansas, in lands purchased by her husband with his own funds and deeded to him "and at his death to his sons," his interest being a life estate only.—*Osborn v. Osborn*, 102 Kan. 890, 892, 172 Pac. 23. Property was left by a testatrix to her son, who had had two wives, both then dead, for life, but if he should marry again, the third wife and his children by her should take; if, however, the son "should die leaving no wife and children by

a third wife then etc., etc. The son died leaving a fifth wife, but no children by his third wife, the only children being two by the second wife. The court awarded the property one-half to the widow and one-fourth to each of the children.—*Mallows v. Mallows*, 93 Kan. 551, 144 Pac. 829. Under a will giving land to the testatrix's husband, with provisions that if he does not survive her, the land shall go to her brother and his heirs, but that if the husband does survive her, he is to have and hold the property during his life, and at his death to devise it to her brother, the husband takes a life estate with remainder to the brother.—*Rooney v. Hurlbut*, 79 Kan. 231, 98 Pac. 765. No "trust" is created by a will giving a fund to the husband for life, remainder over in any unused portion, within the Cal. Code Civ. Proc., section 1699, providing for the settlement of accounts of trustee by the probate court.—*Hardy v. Mayhew*, 158 Cal. 95, 139 Am. St. Rep. 73, 110 Pac. 113. Upon the death of a life tenant, the property as to which the life estate existed forms no part of his estate and his personal representatives have no right to it in their representative capacity. If such representatives wrongfully takes possession of it, an action for its recovery should be brought against them as individuals.—*Luscomb v. Fintzelberg*, 162 Cal. 433, 123 Pac. 247. A devise in fee made in the body of a will is changed to one for life by a provision in a codicil whereby named persons are to take in case of the death of the devisee without lawful issue.—*Love v. Lindstedt*, 76 Or. 66, Ann. Cas. 1917A, 898, 144 Pac. 935. Where a life estate is fixed in the will upon an event that is bound to happen in the course of time, the life estate and the remainder, vest at the death of the testator in the legal heirs, and the title in the remainder is not held in abeyance until the determination of the life estate,—the words of the will creating such vested life estate and vested remainder being, after creating the life estate, the property then, "to descend to my legal heirs."—*Bunting v. Speck*, 41 Kan. 424, 3 L. R. A. 690, 21 Pac. 288, 294. Where a will contained the provision: "I wish my wife to have all my property of every kind that I may own at my death, to have for her own use and benefit while she may live," with a disposition of all property that might be left by her at her death; the widow takes a life estate, with power to convert in fee.—*Greenwalt v. Keller*, 75 Kan. 578, 90 Pac. 233, 234. Under a devise in a will by which the wife is to hold the property "during her life, or while she shall remain unmarried, and that at her death or marriage, it shall descend in equal proportions to the testator's children," etc., the devise is a clear manifestation of the intention to limit the estate given the widow to her natural life, with the remainder over to her heirs.—*Winchester v. Hoover*, 42 Or. 310, 70 Pac. 1035, 1036. Where the testator in his will provides as follows: "I give to my wife, all my real and personal property for her use and benefit as long as she lives, then to be divided as follows," etc.; the wife is given only a life interest in such property, and is, therefore, entitled only to the income or use of the same during her lifetime.—*Chase v. Howie*, 64

Kan. 320, 67 Pac. 822, 823. A testator who provides for his wife in terms that would create a fee simple, save that he provides for the disposition of the same property after her death, leaves her only a life estate.—*Scott v. Gillespie*, 103 Kan. 745, 176 Pac. 132.

REFERENCES.

Apportionment of income upon death of life beneficiary between distributive periods.—See note 27 L. R. A. (N. S.) 449.

(2) *Life tenant purchasing outstanding title.*—Where a life tenant and executrix of the estate in full possession, purchases the outstanding title, which she afterward declared was negotiated as an individual investment, intending thereby to become the absolute owner thereof, unincumbered by any trust obligations; where the equities as to the value of the property, and the amount paid, are strongly against her contention; and where it appears that the original intention was that the purchase was to be for the benefit of the devisees under the will, the purchaser ought to be regarded as holding the legal title to said premises in trust for the beneficiaries under said will, and no claim for the value of improvements placed upon the property, under such circumstances, can be allowed.—*Moore v. Simonson*, 27 Or. 117, 39 Pac. 1105.

(3) *Power of disposition.*—Where the only devise of property is of a life estate, the power of disposition in the devisee is limited to such as a life tenant only may exercise. If the will gives no power to such devisee to sell or dispose of the fee, none can be inferred from the necessities of the case.—*Winchester v. Hoover*, 42 Or. 310, 70 Pac. 1035, 1037. Where by the terms of the decree the estate of the first taker of the property distributed is expressly defined to be a life estate, with a power of disposition annexed, to be exercised for a specific purpose only, with a limitation over, the power of disposition does not enlarge the life estate into a fee or an absolute right of property, and the limitation over is good. This rule applies to dispositions of real as well as personal property.—*Luscomb v. Fintzelberg*, 162 Cal. 433, 123 Pac. 247. A testator who devises to the widow, "to have, enjoy, sell, or dispose of in any manner she may see fit," and, in a subsequent clause of the will, provides that all the property she may die seised of shall then be distributed among his grandchildren, leaves the widow a life estate with power of disposal.—*Scott v. Gillespie*, 103 Kan. 745, 176 Pac. 132, 133. A testamentary provision to a widow "and her assigns" and a devise to the children of the property "remaining" indicate that the testator designed to give the widow a power of disposition.—*Lucas v. McNeill* (Kan.), 231 Fed. 672, 675, 145 C. C. A. 558. Where a will declared that the testator's widow should be the real owner and have complete control of the testator's property, etc.; named an executor and prescribed his duties and fixed his compensation; directed the sale of his household goods; made a special allowance to whichever one of his children his widow should choose

to live with; and provided for a determination of the amount and value of the property aforesaid after the death of the testator's widow, and directed that it be divided equally among his children or their heirs; such will bequeathed to the widow a life estate, with power of disposition, and bequeathed a vested remainder to his children.—*Markham v. Waterman* (Kan.), 181 Pac. 621, 622. Where holders of life estates, under the will of their father, submitted to judgments in their mother's favor for money owed her, and she became purchaser at the sheriff's sale of their interests, as above, in execution, and then conveyed to a daughter, the estate taken by the mother and so conveyed was the terminable life estates of those sons; since the devise of the life estates was with remainders to the heirs of the bodies of the devisees, "with power in each of" the testator's children "to dispose of his or her share of the estate during his or her life."—*Ryan v. Cullen*, 96 Kan. 284, 150 Pac. 597. After a testator has disposed of his property by will, creating and bequeathing a life estate therein to his widow and the remainder to his sons in undivided equal shares, a subsequent provision in the will, that if any son should die before the termination of the life estate, such son's share should be paid to his descendants and should not lapse, is a mere direction in accordance with the statute of descents and distributions and does not fairly imply that the sons may absolutely dispose of the undivided interests vested in them by their father's will.—*Stevenson v. Stevenson*, 102 Kan. 80, 83, 169 Pac. 552. A joint will of husband and wife, whereby everything is to go to the survivor of them and, on the death of the survivor, to their children "all the estate of the survivor not disposed of by such survivor," vests a life estate in the survivor with remainder to the children; but gives the survivor full power of disposition.—*Postlethwaite v. Edson*, 98 Kan. 444, 155 Pac. 802. The giving of power and discretion, to a beneficiary under a will, to terminate a life estate, is a personal disposition, and does not create a property or right susceptible of subjection to forced sale under execution.—*Ryan v. Cullen*, 96 Kan. 284, 150 Pac. 597. Where the principal clause in a will executed by a husband and wife was as follows: "They and each of them do hereby devise and bequeath to the other surviving, all the estate . . . of which the one dying first shall be seised, or have an estate, claim, or interest therein, and to be owned and disposed of by the survivor as he or she may desire, and that upon the death of the survivor, all the estate of the survivor not disposed of by such survivor, is hereby devised and bequeathed to their children . . . in equal parts," it was held that such devise as to any of the property of which the survivor died seised vested in such survivor a life estate with the added power of disposal, remainder to the children.—*Postlethwaite v. Edson*, 98 Kan. 444, 155 Pac. 802, 102 Kan. 104, 106, 171 Pac. 769.

REFERENCES.

Devise or bequest for life with power of disposal.—See note to *Hardy v. Mayhew*, 139 Am. St. Rep. 82-120. Power to create remainder after life estate with absolute power of disposal.—See note 39 L. R. A. (N. S.) 805. Devise over of life estate with power of disposition, validity, and effect of.—See note 7 Am. & Eng. Ann. Cas. 953.

(4) Rule in *Shelley's case* abrogated in Idaho.—Under the provisions of section 3076 of the Revised Codes of Idaho the common law rule, generally known as the "Rule in *Shelley's Case*," has been abrogated and the term "heirs" has been changed from a word of limitation to one of purchase.—*Willson v. Linder*, 18 Ida. 438, 138 Am. St. Rep. 213, 110 Pac. 274.

REFERENCES.

The rule in *Shelley's Case*.—See note 29 L. R. A. (N. S.) 963.

7. Estate for years.—A testatrix devised to the infant daughter of her son certain real estate, known as the "home," and by a codicil to her will directed that the son and his family might "enjoy the said home herein mentioned, free of rent, during the minority" of the said granddaughter; and, in an action to determine the rights of the parties, it was held, (1) that the son and his family took an estate for years—during the minority of the granddaughter—in the home place, and not a mere license to occupy the same, and might lease the said home place and collect the rents therefor; (2) that the son and his family took such estate for years subject to the burden of usual repairs, and that additions made to the house by the son voluntarily, which resulted in direct benefit to himself and family, could not be recovered by him against the estate of his said infant daughter; (3) that the son had an insurable interest in the improvements on said "home" and might insure the same or not, as he saw fit; (4) that the infant daughter had an insurable interest which her guardian might insure at the expense of her estate; (5) that for the purposes of taxation the estate for years should be assessed to the son and his family and that the interest of the infant daughter should be assessed as against her guardian, each party to pay the taxes assessed to him respectively.—*Bickerton v. Bickerton*, 24 Haw. 388, 391.

8. Residuary legacies.

(1) In general.—No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient, if the intention of the testator is plainly expressed, that the surplus of the estate, after payment of debts and legacies, shall be taken by a person designated.—*Estate of Upham*, 127 Cal. 90, 59 Pac. 315, 317. Where, by a will written in the Spanish language, the testator made a bequest in terms, which, translated into English, meant, "and everything in the house at that time," such bequest includes moneys which were in a safe in the house.—*Perea v. Barela*, 6 N. M. 239, sub. nom. *García y Perea v. Barela*, 27 Pac. 507, 510. Where the mother of a testator

is the sole surviving heir, under the laws of succession, such heir takes all the inheritable property of the estate, notwithstanding a provision in the testator's will, after making a specific bequest to his mother, "that she shall not have any further part of my estate in line of succession or otherwise." Such declaration must be regarded as nugatory, unless the estate which the law gives to the parent is in terms disposed of to some one else.—*Andrews v. Harron*, 59 Kan. 771, 51 Pac. 885. An unequivocal, direct, and positive devise of an absolute estate is not to be restricted by ambiguous and uncertain provisions following in the will, and this applies to a devise of the residuary interest in the estate.—*Reeves v. School District*, 24 Wash. 282, 64 Pac. 752, 753. Section 1452 of the Code of Civil Procedure of California, providing that the heirs or devisees may maintain an action for the recovery of the real estate against any one except the administrator or executor, can not be considered as applying to a remainderman, although he may have received his estate through a devise, and, therefore, is literally, in the general category of "devisees." That section means only those heirs and devisees who have a present right of possession, and, therefore, a present cause of action, as against every one except the administrator. Therefore, such a statute could not run against a remainder man during the life of a particular tenant.—*Pryor v. Winter*, 147 Cal. 554, 109 Am. St. Rep. 162, 82 Pac. 202, 203. A residuary legacy embraces only that which remains after all the other bequests of the will are discharged. There can be but one such residuum.—*Estate of Williams*, 112 Cal. 521, 526, 53 Am. St. Rep. 224, 44 Pac. 808. An action by a residuary legatee to set aside a sale of real property made by the executors, or for damages, can not be maintained where the evidence fails to show such an inadequacy of consideration as would raise the presumption of fraud, or a want of judgment and discretion on the part of the executors.—*Sharp v. Greene*, 22 Wash. 677, 62 Pac. 147, 152. Where a testator directs that a sale of a remainder of his property be made, and that the proceeds shall be divided among his four sisters, this constitutes, a residuary legacy to each of them.—*In re Hawgood's Estate*, 37 N. D. 565, 582, 157 N. W. 117. While the extent of the residuary estate can not be definitely ascertained until the final accounting of the executor, it vests in the residuary legatee at the instant of the death of the testator.—*Estate of Hite*, 159 Cal. 392, Ann. Cas. 1912C, 1014, 32 L. R. A. (N. S.) 1167, 113 Pac. 1072. In considering a residuary bequest it must be kept in mind that there is but one residue of an estate, it consisting of that which is left after the payment of debts and legacies, and the satisfying of other specific gifts.—*In re Hartung's Estate*, 39 Nev. 200, 211, 155 Pac. 353. A residuary bequest, "to be divided between my said cousins and the sisters of my deceased husband and" a named person, is to be construed as meaning that one-half is to go to the cousins and the remaining half to the others.—*Roelf's Cousins v. White*, 75 Or. 549, 147 Pac. 753.

(2) **Intestacy as to residuum.**—The presumption that a testator intended to make a disposition in the will executed, of his entire estate, is not conclusive; for it might happen that a person may desire to make a definite disposition of a portion of his estate, and be willing to leave the disposition of the remainder to the direction of the law.—*Taylor v. Horst*, 23 Wash. 446, 63 Pac. 231, 232. A presumption exists that the testator devises his whole estate when he makes his will; but it is equally necessary that the person to whom the estate is devised should be indicated. Where, therefore, it can not be determined from the will as to who shall take the residue, the testator must be regarded as having died intestate as to such residue, and the same will be distributed according to the law of descent.—*Cross v. Cross*, 23 Wash. 673, 63 Pac. 528, 529.

(3) **Residuary devise of life estate.**—A residuary devise of a life estate by a testator to his wife, "to have and to use and to dispose of during her natural life, and after her death to be divided equally among my three youngest heirs, namely," etc., gives the wife authority to convey the fee, and the part undisposed of descends to the children in accordance with the will.—*Ernst v. Foster*, 58 Kan. 438, 49 Pac. 527, 529. Where a testator devises a beneficial interest in the residue of his estate to his wife during her life, and attempts to create a trust, it is immaterial, so far as concerns the remaining heirs, whether or not a valid trust was created, if, notwithstanding its invalidity, there was such a disposition of the property made to the wife as should be upheld under the settled principles of testamentary construction.—*McClellan v. Weaver*, 4 Cal. App. 593, 88 Pac. 646.

(4) **Where life estate is specifically bequeathed.**—In the absence of anything showing a contrary intention on the part of the testator, a residuary clause in the will will carry the fee of lands in which a life estate is specifically devised.—*Sullivan v. Larkin*, 60 Kan. 545, 57 Pac. 105, 106.

(5) **Residuum of lands under undelivered deeds.**—Where deeds have been made by the testator but not delivered, no title to the lands mentioned therein passes thereby, and the lands remain a part of his estate, and are properly included in the residue of the estate devised by the will.—*Ostrom v. DeYoe*, 4 Cal. App. 326, 87 Pac. 811, 813.

(6) **Gifts when payable out of residuum.**—Where the intent of the testator is clear that a gift which he makes should not be chargeable upon any particular fund or property, the legacy should be satisfied out of whatever residue there shall be in the estate, and it is error for the court to hold that the legacy must fail because, under the will, "it was to be a charge on the personal property alone," all such personal property having been exhausted by the payment of the expenses of administration, family allowance, etc.—*Estate of Ratto*, 149 Cal. 552, 86 Pac. 1107, 1108. Under a will distributing \$180,000 in money legacies and expressly excluding any share therein by specific

devisees and legatees of all the testator's land, pictures, jewelry, and furniture, declaring that he made "no money bequests" to them as the real estate "so bequeathed to them in equal shares is ample and sufficient," but in a final bequest of any possible "surplus money that may be left," the will states that it shall be divided equally among "the legatees herein mentioned share and share alike," the specific devisees and legatees are entitled to share pro rata in such surplus.—Estate of Goetz, 13 Cal. App. 266, 109 Pac. 105. Where a will of a testatrix, after providing for the payment of certain special pecuniary legacies, directed that all her real estate, with a specified exception, should be sold by her executors to the best advantage, and, after the payment of such legacies, which were expressly charged upon the real estate so to be sold, bequeathed "all the rest and residue of the proceeds of said real estate so to be sold" to certain persons named, as trustees in trust, to found and maintain a home for aged and infirm men, and, by a residuary clause, bequeathed the remainder of her estate to her husband, the only proceeds of her real property passing to such trustees were proceeds of such real property as she owned at her death and which her executors were empowered to sell. The proceeds of a portion of her real estate, sold by her in her lifetime under a contract for its sale which had become executed before her death, and which proceeds were collected by her executors after her death, did not pass to such trustees, but passed under the residuary clause. There is nothing in the provisions of sections 1301 and 1303 of the Civil Code of California militating against such a construction.—Estate of Dwyer, 159 Cal. 664, 115 Pac. 235.

REFERENCES.

Predeceased child, right of representative of, to share in remainder given to children as a class.—See note 2 Am. & Eng. Ann. Cas. 645. Residuary clauses in a will.—See note Kerr's Cal. Cyc. Civ. Code, §§ 1332, 1333. Revocation of testamentary gift of particular estate or interest as revocation of remainder or limitation over.—See note 5 Am. & Eng. Ann. Cas. 789.

9. Payment of legacies. Interest.

(1) In general.—Legacies are due and deliverable after the expiration of one year from the testator's decease, even where administration has been prevented by contests of the will, or in regard to the right to administer.—Estate of Williams, 112 Cal. 521, 525, 53 Am. St. Rep. 224, 44 Pac. 808. If a legacy falls due, the probate court can order the personal representative to pay it. This may also be done upon notice.—Toland v. Earl, 129 Cal. 148, 152, 79 Am. St. Rep. 100, 61 Pac. 910; Estate of Dunne, 65 Cal. 378, 4 Pac. 375. The court does not err in directing the payment of a legacy where the executors have in their hands a sum of money much in excess of such legacy, although a suit is pending as to a rejected claim of another person against the estate.—Estate of Chesney, 1 Cal. App. 30, 33, 81 Pac. 679. In determining the

amount of money in the hands of executors available for the immediate payment of a legacy, the court is not required to take into consideration the amount that may be necessary for the erection of a tombstone provided for by the will.—*Estate of Chesney*, 1 Cal. App. 30, 81 Pac. 679, 680. The personal representative has no right to object to paying legatees on the ground that they have forfeited their right to the legacies, because of an alleged violation of a provision in the will. That is a question in which he has no interest. It concerns only the rights of the residuary devisees.—*Estate of Murphy*, 145 Cal. 464, 78 Pac. 960, 961. A will containing the following provision: "I request him (the executor), to invest the sum of \$1000 in some satisfactory security and transfer the same to the Ventura lodge," etc., can not be made the basis of an action by the donee to compel the executor to convey to said lodge the sum mentioned in the will, as there is no warrant, under such a bequest, for an unconditional money judgment.—*Kauffman v. Greis*, 141 Cal. 295, 74 Pac. 846, 848. A devisee who accepts a devise charged with the payment of legacies, becomes personally answerable therefor.—*Dunne v. Dunne*, 66 Cal. 157, 4 Pac. 441, 1152. Under a clause in a will providing that a portion of the property is to be paid to children, upon attaining their majority, such children can not receive their portion before the time fixed in the will, and until they arrive of age, the executors of the will must have charge of their interests, carefully keeping the moneys of the estate under the direction of the court.—*Morse v. Macrum*, 22 Or. 229, 29 Pac. 615. While the language of subdivision 4 of section 1360 of the California Civil Code, providing for the order of payments out of the property of the estate, is doubtful in its meaning, it has been held that specific legacies or devises are not chargeable thereunder with the payment of general legacies.—*Estate of Painter*, 150 Cal. 498, 11 Ann. Cas. 760, 89 Pac. 98, 100; *Estate of Nelstrath*, 66 Cal. 303, 5 Pac. 507. The payment of a legacy, under an order of the court therefor is presumed, in the absence of evidence to the contrary, to have been made as soon as possible.—*Cobb v. Stratton's Estate*, 56 Colo. 278, 282, Ann. Cas. 1915C, 1166, 138 Pac. 35.

REFERENCES.

Order of resort to property of testator for payment of legacies.—See note *Kerr's Cal. Cyc. Civ. Code*, §§ 1360, 1361; legacies, when due and deliverable.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1368. Remedies for enforcement of legacy when charged upon devise.—See note 30 L. R. A. (N. S.) 815.

(2) Interest.—Legacies bear interest from the time they are due and payable.—*Estate of Williams*, 112 Cal. 521, 525, 53 Am. St. Rep. 224, 44 Pac. 808. Interest allowed on particular legacies always comes from the residuum, and when the money is retained by the estate, its use is presumably to the advantage of the residuary.—*Estate of Williams*, 112 Cal. 521, 526, 53 Am. St. Rep. 224, 44 Pac. 808. If a testator directs a legatee to be paid out "of the first moneys realized from my

estate, when the amount of the legacy shall come into their hands," after the "payment of all my just debts and funeral expenses," it is clearly the testator's express intention that the legacy shall not become due and payable until after all his debts and funeral expenses have been paid. It does not therefore bear interest until after such payment.—Estate of James, 65 Cal. 25, 2 Pac. 494. There is no such thing as interest upon a residuary legacy, for there can be no fund from which the interest could be paid.—Estate of Williams, 112 Cal. 521, 526, 53 Am. St. Rep. 224, 44 Pac. 808. The right of a legatee to interest is a matter of statute, and the statutes of Colorado give none.—Cobb v. Stratton's Estate, 56 Colo. 278, 289, Ann. Cas. 1915C, 1166, 138 Pac. 35. A legacy is due and payable only after it has been judicially determined by the court having the estate in charge, that there are sufficient assets to satisfy all legacies and demands against the estate and an order for payment has been made. A specific pecuniary legacy does not begin to carry interest after the expiration of one year from probate of will.—Cobb v. Stratton's Estate, 56 Colo. 278, Ann. Cas. 1915C, 1166, 138 Pac. 35, 37. A legacy, notwithstanding its being a charge on the estate, is payable only on order of court, unless the time of payment is fixed by the will; hence, the legatee can make no lawful demand until the order is filed and interest runs only from the date of such filing.—Cobb v. Stratton's Estate, 56 Colo. 278, 282, Ann. Cas. 1915C, 1166, 138 Pac. 35. Where a legacy is payable monthly, but the fund out of which it is to be paid is available only at greater intervals, it does not carry interest.—Jesseph v. Westerberg, 94 Wash. 602, 162 Pac. 1004. One having a claim for interest on his legacy, as having accrued prior to the making of the decree of distribution, must assert it in the proceeding for that decree, or suffer the consequences of his failure.—Estate of Schmierer, 168 Cal. 747, 145 Pac. 99. A legacy directed to be paid monthly out of the revenues of farm land is to be construed as contemplating payment, will all deficiencies, at the rate of that much per month, at any time when there are net revenues available for the purpose.—Jesseph v. Westerberg, 94 Wash. 602, 162 Pac. 1004. A direction, in a will, that the executor pay to a named beneficiary a specified sum, each and every month during the life of the testator's widow, effects a specific legacy and not an annuity; the payments begin therefore on the testator's death.—Jesseph v. Westerberg, 94 Wash. 602, 162 Pac. 1004. The court, by decreeing the distribution of a legacy without interest, determines that the legatee is not entitled to interest.—Estate of Schmierer, 168 Cal. 747, 145 Pac. 99. Under a will providing for devises and bequests in trust for the purposes therein enumerated, and directing that the estate shall be settled by trustees, without the intervention of the court, and giving to these large discretion, and fixing no time for the settlement of the estate, interest can not be claimed by the legatees, because of their not having been paid within a year after the testator's death.—Marconnier v. Preston, 96 Wash. 374, 165 Pac. 72.

REFERENCES.

Interest upon legacies.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1369.

(3) **Bond by legatee.**—The court may order the payment of a legacy without exacting a bond from the legatee, if the estate “is but little indebted,” and the court is satisfied that no injury can result to the estate.—*Estate of Chesney*, 1 Cal. App. 30, 81 Pac. 679, 680. The purpose of a bond given by a legatee for the payment of his proportion of the debts is principally to secure the estate against contested claims, or claims which may come in after the order is made.—*Estate of Dunne*, 65 Cal. 378, 380, 4 Pac. 379.

10. Ademption and abatement.—A specific bequest is subject to ademption, but such is not true of a general, or a demonstrative, legacy.—*Nusly v. Curtiss*, 36 Colo. 464, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134, 7 L. R. A. (N. S.) 592, 85 Pac. 846, 847. A bequest of the proceeds of a life-insurance policy is a specific bequest, and where the testator collected such proceeds and mingled the funds with his own, generally, it constitutes an ademption of the legacy.—*Nusly v. Curtiss*, 36 Colo. 464, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134, 7 L. R. A. (N. S.) 592, 85 Pac. 846, 847. Ademption is merely one of the ways in which a legacy lapses. Ademption of a specific legacy is the extinction or withdrawal of it in consequence of some act of the testator equivalent to its revocation, or clearly indicative of an intention to revoke. The ademption is effected by the extinction of the thing or fund bequeathed, or by a disposition of it subsequent to the will, which prevents its passing by the will, from which an intention that the legacy should fail is presumed.—*Estate of Goodfellow (McKee v. California A. C. of M. E. Church)*, 166 Cal. 409, 137 Pac. 12. A devise to a widow will be abated in favor of a child born after the date of the will where no intention to disinherit appears, in accordance with the provisions of section 4659, *Mills Ann. Stats. of Colorado*.—*Lowrey v. Harlow*, 22 Colo. App. 73, 123 Pac. 147. If a testatrix, long prior to her death, receives and disposes of her share in her father's estate, such legacy is adeemed.—*Estate of Goodfellow (McKee v. California A. C. of M. E. Church)*, 166 Cal. 409, 137 Pac. 12. A grantor's heir is barred by an unrecorded deed, heirs not being within the class exempted from the effect of such a deed.—*Hallett v. Alexander*, 50 Colo. 37, Ann. Cas. 1912B, 1277, 34 L. R. A. (N. S.) 328, 114 Pac. 490, 493.

REFERENCES.

Disposal, loss, or destruction of subject-matter, or payment of debt, as ademption of specific legacy or devise.—See note 40 L. R. A. (N. S.) 542, 553, 561.

11. Advancements or gifts.—The common law rule that one who has received property by way of advancement must bring it into hotch-potch, if he wishes to claim a portion of the estate of an intestate as an heir, is abolished by the Kansas statute which provides in substance that advancements shall be considered as part of the estate, but that

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one who has received an advancement in excess of his share need not refund any part of it.—*Burns v. Burns*, 87 Kan. 19, 123 Pac. 721. Unless there is something in the will to the contrary, advancements will be deducted from the shares of residuary legatees and divided among those who have not received advances so that on final division the shares of all will be equal.—*In re Pickard's Estate*, 42 Utah 105, 129 Pac. 353, 356. Where a testatrix expressly declares in her will that one of her sons has already received property by way of advancement amounting to more than his share of the estate, and that therefore she leaves him nothing, the death of one of the other of her four sons mentioned in the residuary clause of the will subsequent to the execution thereof and prior to the execution of a codicil thereto, does not entitle the former to participate in the estate, the codicil expressly confirming the will without rewriting it both as to dispositions of property made thereby and as to advancements mentioned therein.—*Estate of Hayne*, 165 Cal. 568, Ann. Cas. 1915A, 926, 133 Pac. 277. No special form, nor even the signature of the decedent is required to constitute a charge of the advancement in writing to an heir of his portion of an estate. It is sufficient if it appears that the writing was done by the decedent and shows the intent to charge the money or property given, as an advancement, rather than as a gift or loan.—*Estate of Hayne*, 165 Cal. 568, Ann. Cas. 1915A, 926, 133 Pac. 277. The rule that it is the intention of the decedent at the time the property is transferred to the heir apparent that determines whether it is an advancement or a gift, and that if it was then transferred and vested as a gift, a subsequent written declaration by the decedent, no part of the *res gestae* of the transaction, that it constituted or should be taken as an advancement, is of no force, and is incompetent as evidence that it was an advancement, is subject to the qualification that if the subsequent declaration is contained in a legally executed and probated will, it is competent evidence of the advancement and must prevail.—*Estate of Hayne*, 165 Cal. 568, Ann. Cas. 1915A, 926, 133 Pac. 277. The statement in a will that an heir has received property, by way of advancement, amounting to more than his share of the estate, is a sufficient charge in writing to constitute legal evidence of an advancement under the provisions of sections 1396 and 1397 of the Civil Code of California.—*Estate of Hayne*, 165 Cal. 568, Ann. Cas. 1915A, 926, 133 Pac. 277. The statement in a will that an heir has received property by way of advancement amounting to more than his share of the estate is not affected by the death of one of the heirs mentioned in the will subsequent to the execution thereof, where in a codicil made after such death the provisions of the will respecting advancements are expressly confirmed.—*Estate of Hayne*, 165 Cal. 568, Ann. Cas. 1915A, 926, 133 Pac. 277. The rule that statutory provisions regarding advancements apply only where the decedent died wholly intestate is not in force in California.—*Estate of Hayne*, 165 Cal. 568, Ann. Cas. 1915A, 926, 133 Pac. 277. The general rule that advance-

ments made before a will was executed can not be considered in making distribution of the estate has no place where the terms of the will itself show the contrary, and particularly where it expressly declares a full advancement has been made, and it appears that the testatrix in making the declaration had in mind her entire estate, and the shares of each heir therein under the law of descent, and that the intestacy, if any, did not occur because of ignorance of the extent of the property she owned, but either from inadvertence or design, or from a mistake as to the legal effect of the residuary clause.—*Estate of Hayne*, 165 Cal. 568, Ann. Cas. 1915A, 926, 133 Pac. 277. It is held that the proposition involved in the codicil was not complicated, but simple, and consisted merely in directing that, as the gifts already given to the daughter and son were of unequal value, the daughter having received more advances in value than the son, the same should be equalized in the final division of the property.—*Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597. Advancements or gifts are not to be taken as ademption of general legacies unless such intention is expressed by the testator in writing. When a woman makes a bequest of \$500 to each of her two nieces and thereafter sends them bank certificates totaling \$1000 and writes letters referring to the transfer and impressing upon them her desire that the principal be not touched by them during her lifetime, these letters comprise such an expression in writing as the statute contemplates, and such certificates are in ademption and satisfaction of the legacies.—*Estate of Baker*, 168 Cal. 766, 769, 145 Pac. 1005.

REFERENCES.

Gift to one spouse by parent of the other as advancement or ademption.—See note 26 L. R. A. (N. S.) 1050. The matter of advancements is dealt with in a note to the case of *Crain v. Mallone*, 132 Am. St. Rep. 359; *Elliott v. Western Coal Co.*, 134 Am. St. Rep. 401. Ademption of legacies.—See note in 95 Am. St. Rep. 342. Advancements or gifts, when not taken as ademption of general legacies.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1351. Ademption of legacies.—See notes 37 Am. Dec. 667-671, 95 Am. St. Rep. 342-370. Abatement of legacies in any one class.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1362.

12. Application of legacies to payment of debts.—If a special bequest is applied to the payment of a debt, and there are other legatees, the remedy of the legatees whose bequest is so applied, is to seek contribution from the others.—*Estate of Moulton*, 48 Cal. 191, 192. Specific legacies and specific devises stand upon the same footing with respect to the payment of debts, and neither is to be charged until the remainder of the estate, both real and personal, is exhausted.—*Estate of Woodworth*, 31 Cal. 595, 611. If a legatee assigns his interest in the estate, as security for a debt, the assignee thereof is entitled, on distribution of the estate, to the payment of his debt out of the legacy so assigned.—*Estate of Phillips*, 71 Cal. 285, 12 Pac. 169, 171. When it is necessary that some of the real property of an estate be sold to pay

indebtedness and all the real property has been disposed of by specific devises the property under each devise is liable equally for the payment of the indebtedness.—*Howe v. Kern*, 63 Or. 487, 125 Pac. 938. The direction, in a will, to the executrix to "pay all my lawful debts and the expenses of my funeral" does not appropriate to such payment the proceeds or avails of insurance on the life of the testator, even if the executrix is given these proceeds or avails and there are no other assets.—*German-American State Bank v. Godman*, 83 Wash. 231, 145 Pac. 221.

REFERENCES.

Order of abatement to pay debts, as between demonstrative legacies and specific legacies or devises.—See note 4 L. R. A. (N. S.) 922, 923. Abatement of legacies in case of deficiency of assets.—See note 8 Am. St. Rep. 720-726. Consult notes to the following sections of *Kerr's Cal. Cyc. Civ. Code*, as to the matters indicated.—Order of resort to estate for debts, § 1359; provision by will for payment of debts, effect of, when insufficient, § 1562; entire estate of intestate chargeable with debts, except when otherwise provided, § 1358; contribution among legatees, § 1564; liability of beneficiaries for testator's obligations, § 1377. Upon whom the liability of an heir or devisee for his decedent's debts devolves at his own death.—See note 39 L. R. A. (N. S.) 689.

13. *Future interests*.—A vested future interest in fee derived under a will, will pass by grant, devise, or succession, and the devisee may alienate it at his pleasure. If he should die before distribution, without such alienation, it will vest in his heirs, devisees, or legatees.—*Williams v. Williams*, 73 Cal. 99, 14 Pac. 394, 396.

14. *Preferred legatees*.—Where a testator bequeathed all his property to his wife, "she to pay the bequests following" (after which the bequests were designated), and where the testator further provided that the share of the wife be not less "than \$7000, inclusive of the \$3000 policy on my life in the Royal Arcanum and another \$2000 policy on my life in the Ancient Order of the United Workmen, payable now to her," the language quoted indicates that the testator's wife should be a preferred legatee to the sum of \$2000 to be paid out of his estate, it being the evident intent of the testator that his wife should be worth the sum of \$7000—\$5000 of her own by policies, and \$2000 from his estate.—*In re Phillip's Estate*, 18 Mont. 311, 45 Pac. 222.

15. *Creditor as legatee*.—Where there is nothing in the language of a will which puts a legatee to the necessity of abandoning his rights as a creditor for such amounts as are not barred by the statute of limitations, he is not estopped to claim as an ordinary creditor.—*Estate of Barclay*, 152 Cal. 753, 93 Pac. 1012, 1014. If a testator, who directs that all his debts be paid, makes a bequest to a creditor, a presumption is not raised thereby that this is to be in lieu of paying what is due him.—*Olsen v. Hagan*, 102 Wash. 321, 172 Pac. 1173. Where a testator who was the holder of a note gave to the maker a legacy of \$1000 to be

credited on the note, such legacy is a specific bequest which vests at the time of testator's death, and thereafter the note ceases to carry interest as against the legatee to the extent of the \$1000.—*Martin v. Barger*, 62 Wash. 672, 114 Pac. 506.

16. Conditional and contingent devises.—A certain sum bequeathed and to be paid "after the payment of debts and funeral expenses," does not become due and deliverable at the expiration of one year after the testator's decease, and consequently, it is error to allow interest thereon after the expiration of that period. Such a legacy becomes due and payable after the debts and funeral expenses are paid, and not otherwise.—*Estate of James*, 65 Cal. 25, 2 Pac. 494. Where a testatrix, in making bequests to her daughter, provides that the same, "shall take effect" in "event of my said daughter becoming a widow, or otherwise becoming lawfully separated from her husband," there is nothing in the condition referred to that can be against public policy, as holding out an inducement to a daughter to live separate or apart from her husband. It can not be said that a condition attaching to a legacy is against public policy where such condition tends to induce a legatee to do a lawful act in a lawful way.—*Born v. Hortsman*, 80 Cal. 452, 5 L. R. A. 577, 22 Pac. 338, 339. Provisions in a codicil that the dividends on corporation stock bequeathed, shall be divided among the testator's heirs at law, "who under my said will would be entitled thereto," constitute, in the light of the attending circumstances, a bequest of the profits, burdened with an obligation to pay the debts of the decedent's estate.—*In re Noon's Estate*, 49 Or. 286, 88 Pac. 673, 677, 90 Pac. 673. To create a condition in the case of a devise or bequest apt words to that end must be used. It is not necessary, however, that any particular form of words shall be employed, but whenever it clearly appears from the language used, aided, it may be, in a proper case by extrinsic evidence, that it was the intention of the testator to impose a condition precedent or subsequent, such intention will be given effect.—*In re Gray's Estate*, 27 N. D. 417, L. R. A. 1917A, 611, 146 N. W. 722, 724. Where a gift is made by will to a public body upon condition that it will provide funds for the purpose of making such gift available the gift is void where such public body has not power to provide the funds contemplated.—*Robbins v. Hoover*, 50 Colo. 610, 115 Pac. 527. A disposition of real property by words of direct present devise "to be distributed and delivered" to the devise when he shall have reached the age of twenty-one years, and shall have in writing signified his consent to carrying out the life work of the testatrix as outlined by the articles of incorporation and by-laws of the "Christ Doctrine Revealed and Astronomical Science Association," in which event "he shall take in fee simple," but that should he fall in that regard the property "shall then remain a part" of the estate, and go to such association, is a devise upon condition subsequent as to such devisee, and vests in him a present estate.—*Estate of Budd*, 166 Cal. 286, 135 Pac. 1131. The rule of construction embodied in section 1336

of the Civil Code of California, that "words in a will referring to death of survivorship, simply, relate to the time of the testator's death," etc., is applicable only where there are words referring to death or survivorship, simply. It is not applicable where the words refer to death upon a contingency, as, for example, to death "without issue," and there is no provision in our codes declaring what the rule should be where the words refer to death upon a contingency.—*Estate of Carothers*, 161 Cal. 588, 119 Pac. 926. The question whether a will with a restraint upon remarriage imposed a valid limitation on the life estate granted to the widow, or created a prohibited condition subsequent imposing a restraint on marriage, was necessarily presented for decision on the petition for final distribution, and the decision reached thereon would be conclusive as to the respective rights of the devisees and legatees.—*Estate of Fitzgerald*, 161 Cal. 319, 49 L. R. A. (N. S.) 615, 119 Pac. 96. A provision in a will providing for the forfeiture of a legacy or devise in the event of a contest of the will by the beneficiary is not against public policy. Such a provision is valid and will be enforced according to its terms, notwithstanding the beneficiary may have had probate ground for the contest.—*Estate of Miller*, 156 Cal. 119, 23 L. R. A. (N. S.) 868, 103 Pac. 842. A person can bequeath a crop yet to be grown the same as he can contract for sale of same or can mortgage it. A bequest of all wheat of which testator was the owner stored on lands belonging to him and one-half of all grain that might be raised on such lands during a year named was a specific bequest.—*Rock v. Zimmerman*, 25 S. D. 241. A will gave the estate of the testatrix to her seven children, share and share alike, subject to these conditions and qualifications: The testatrix claimed in the will that two sons were indebted to her in stated amounts and provided that unless such amounts were paid before her death they should be deducted from the sons' portions of the estate. The sons brought suit to set aside the will. Held extrinsic evidence was not admissible to dispute the claim of indebtedness made in the will, and thereby increase the shares given to the contestants.—*Hopper v. Sellers*, 91 Kan. 876, 139 Pac. 365.

REFERENCES.

Effect of fact that breach of condition in devise or legacy relating to conduct of devisee or legatee is involuntary on latter's part.—See note 27 L. R. A. (N. S.) 684. Whether court will determine whether condition in devise or bequest as to good conduct or character of beneficiary has been satisfied where that duty has been imposed on no one else.—See note 25 L. R. A. (N. S.) 425. Right of court to control discretion vested by will in one person to determine whether or when another fit to receive legacy or devise.—See note 25 L. R. A. (N. S.) 421. Validity of provision in restraint of marriage as affected by fact that the gift to which it relates is to a daughter or other female relative.—See note 49 L. R. A. (N. S.) 606. Provision in restraint of marriage in a deed or will as a condition or a limitation.—See note 49 L. R. A. (N. S.) 615. Validity of condition in restraint of marriage as

affected by fact that a breach entails only a partial forfeiture.—See note 49 L. R. A. (N. S.) 627. Devises or bequests conditioned upon divorce or separation or limited upon its continuance.—See note 49 L. R. A. (N. S.) 637. What language creates a condition subsequent.—See note in 79 Am. St. Rep. 747. Manner of taking advantage of breaches of conditions subsequent.—See note in 93 Am. St. Rep. 572. What are conditions precedent.—See note in 102 Am. St. Rep. 366. Undue influence and presumptions respecting.—See notes in 21 Am. St. Rep. 94, 31 Am. St. Rep. 670. Condition precedent in a will.—See note Kerr's Cal. Cyc. Civ. Code, §§ 1346, 1347, 1348. Conditional estate, words merely declaratory of purpose or consideration of devise as creating.—See note 3 Am. & Eng. Ann. Cas. 38. Condition subsequent in a will.—See note Kerr's Cal. Cyc. Civ. Code, § 1349, and notes 70 Am. St. Rep. 83, 81 L. R. A. 432, 837, 9 L. R. A. 165, 573. Conditional devises and bequests.—See note Kerr's Cal. Cyc. Civ. Code, § 1345. Contingent or conditional will.—See notes 3 Am. & Eng. Ann. Cas., § 1150; Kerr's Cal. Cyc. Civ. Code, §§ 1281, 1345-1349.

17. Accumulations.—Where provision is made in a will for accumulations, one for an older child, and another for a younger child, the provision for such accumulations, being for their sole benefit, can not, by any possibility, suspend the absolute power of alienation for a longer period than during the lives of such children. If the older child die before the specified time, the trust for accumulation for his benefit at once determines for lack of a beneficiary, and the property already accumulated immediately vests in his heirs. The same is true as to the younger child. In neither case, can the trust for accumulations continue longer than during the life of the designated beneficiary in being at the time of the creation of the trust.—Estate of Haine, 150 Cal. 640, 89 Pac. 606, 607; Estate of Hendy, 118 Cal. 656, 50 Pac. 753; Estate of Stevie, 124 Cal. 533, 539, 57 Pac. 564. A bequest of one-half of the income from certain real properties to the nephew of the testatrix to be deposited in a bank and there remain until he arrives at the age of twenty-one years, when the fund "shall become and be" his property, is valid. It is not invalid as a bequest of a future contingent interest, nor as an authorized "accumulation" of assets, nor as a suspension of the power of alienation for a period not provided by law, nor as a creation of a trust not permitted by law. The bequest is a vested interest.—Estate of Budd, 166 Cal. 286, 135 Pac. 1131. Where property was devised in trust to the income to the wife of testator during life, and thereafter to apply so much thereof as was necessary to maintain and educate his daughter until twenty-one years of age, also to pay \$500 per annum to his sister-in-law; and if the daughter should die leaving lawful issue to pay to such issue, if of age, the whole of the property, otherwise to continue to hold it and use the income for their maintenance until they become of age, and then deliver over the property to them; and after the death of the wife, sister-in-law and daughter (if without issue) to convert the estate into money and divide the same

as directed in the will. Held, that the testator did not give the income to the daughter during her life after reaching twenty-one years of age (the wife and sister-in-law having died) by implication; that he did not intend the income to accumulate; and that there was a resulting trust as to the income in favor of the daughter as sole heir, as an undisposed of beneficial interest.—*Von Holt v. Williamson*, 23 Haw. 201.

18. **Annuities.**—The bequest of an amount to be paid monthly is not an annuity where the amount is not certain.—*Estate of Brown*, 143 Cal. 450, 77 Pac. 160, 162. A clause in a will, directing a devisee of lands devised therein to pay an annuity for a period of years to a person named therein, constitutes a legacy for the benefit of such person.—*Dixon v. Helena Society, etc. (Okla.)*, 166 Pac. 114. A specific legacy, or "an allowance of income," to be paid each and every month, is not an annuity but a monthly stipend resting in the life of the legatee.—*Jesseph v. Westerberg*, 94 Wash. 602, 162 Pac. 1004. Where the language of a will is to the effect that annuities, therein directed to be paid, are to be paid "out of the net income," and there is nothing said indicating an intention to make payment from other sources, but rather a positive intent shown that the annuitants shall receive no more than such income shall supply, the probate court should not, before it is ascertained what the net income, if any, will be, after satisfying the express provision, order the executors to make such payments.—*In re Phelps' Estate, Lord v. Chipman*, 179 Cal. 703, 178 Pac. 846. Ordinarily a gift of an annuity, without words of limitation or other significant language, is to be regarded as a gift of an annuity for the life of the annuitant, where such annuity is given for a specified period of time, it is inferred that the intention was that the gift should not terminate with the life of the annuitant.—*Hawaiian Trust Co. v. McMullan*, 23 Haw. 685, 690.

REFERENCES.

Annuities commence at the testator's decease.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1368.

19. **Beneficiaries of benefit certificates.**—The beneficiaries, under a benefit certificate payable to the legal heirs of the insured, take by virtue of the contract, and not by succession, even though the will expressly gives, devises, and bequeaths the moneys that shall be collected thereunder.—*Burke v. Modern Workmen*, 2 Cal. App. 611, 84 Pac. 275, 276. The beneficiary named in a mutual benefit certificate has no property or interest therein that his heirs may succeed to. The interest is a mere expectancy of an incomplete gift, is revocable at the will of the insured, and does not ripen until his death.—*Supreme Council, etc., Legion of Honor v. Gehrenbeck*, 124 Cal. 43, 56 Pac. 640. Where the by-laws of a benefit society prescribe a form to be used by members in designating beneficiaries of death benefits, and provide that "the society does not accept or recognize the validity of any provision or provisions made in any document disposing of the benefit

or part of the same except the declaration which has been duly made out in conformity with the by-laws," the designation of a beneficiary in a will filed with the society does not constitute a valid designation, and the mere receiving and filing of the will by the society will not operate as a waiver of the by-laws so as to estop the society from setting up the invalidity of the designation in an action brought against it to recover the amount of the benefit.—*Monizi v. Santo Antonio Society*, 21 Haw. 591.

REFERENCES.

Testamentary power over insurance benefit certificate.—See note 17 L. R. A. (N. S.) 1083-1088.

20. *After-acquired property*.—The rule of the common law, that after-acquired real estate did not pass by will, does not now obtain in California, where the rule was early changed by statute.—*Estate of Hopper*, 66 Cal. 80, 4 Pac. 984, 985. Under the common law, a will did not affect after-acquired real estate, but this rule has been generally changed by statute, and in most of the states where legislation has been had upon the subject, all property owned by the testator at the time of his death is devised by his last will whenever made.—*Johnson v. White*, 76 Kan. 159, 90 Pac. 810, 812; *Durboraw v. Durboraw*, 67 Kan. 139, 72 Pac. 566, 567. The intention to devise after-acquired property is sufficiently shown by the language, "I give, devise, and bequeath all my real and personal estate, of whatsoever nature or kind soever, and wheresoever situated," etc., and "all the rest, residue, and remainder of my estate, real, personal, and mixed, and wheresoever situated."—*Clayton v. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117, 59 L. R. A. 407, 70 Pac. 429, 433. Land conveyed to executors in trust for persons interested in estate, upon full payment of price under testator's contract for its purchase, held part of estate passing by testator's will in same manner as if deed had been executed prior to testator's death.—*Newlove v. Mercantile Trust Co.*, 156 Cal. 657, 105 Pac. 971.

REFERENCES.

After-acquired property, wills pass estate to.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1312.

21. *Community property*.—The testator has no power to authorize a sale of his wife's interest in the community property, except for payment of debts.—*Sharp v. Loupe*, 120 Cal. 89, 92, 52 Pac. 134, 586; *Estate of Wickersham*, 138 Cal. 355, 70 Pac. 1079. The widow is not estopped from asserting her title to her community interest by accepting a beneficial interest under the will.—*Beard v. Knox*, 5 Cal. 252, 257, 63 Am. Dec. 125; *Estate of Silvy*, 42 Cal. 210, 212; *Estate of Gwin*, 77 Cal. 313, 19 Pac. 527, 528. Where the words "common property" are not used in a will, in their technical sense, such words are given their commonly accepted meaning; but a devise of common property, when there is no such property, does not convey separate property.—*Estate of Reinhardt*, 74 Cal. 365, 16 Pac. 1314. The wife's interest in the community

property is adversely affected by a sale of the community property under a power to sell in the will.—Estate of Wickersham, 138 Cal. 355, 70 Pac. 1079. Where the will is susceptible of two possible constructions—one, that the testator intended to devise all property of which he should be possessed at the last moment of life, including the whole of the community property, over which he had the power of disposition during life; and the other, that he intended to devise only his property then in his possession, over which alone he had power of testamentary disposition—the rules of construction and presumptions of law require the adoption of the latter construction.—Estate of Gilmore, 81 Cal. 240, 22 Pac. 655, 656. The provisions of the law of the state of California giving the wife a one-half interest in the community property and depriving the husband of the power to dispose of such moiety by will, except with the consent of the wife, are well known, and are peculiar as compared with the laws of other states. Owing to the fact that this share is given to her absolutely and in this manner, and because of its peculiarity, it has become common usage to describe this interest in community property as that to which the wife is legally entitled under the laws of California.—Estate of Roach, 159 Cal. 260, 113 Pac. 373. Where the entire estate was community property, an undivided half of the property was all that the testator could, and was all that he attempted to, pass by means of his testamentary disposition. The other half vested at once in his surviving wife.—Estate of Spreckels, 162 Cal. 559, 123 Pac. 371. A testator is presumed to have made his will with knowledge that his power of testamentary disposition did not extend to the surviving wife's interest in the community property, and it is also presumed, in the absence of anything in the will to the contrary, that he did not intend to devise or bequeath her one-half.—Estate of Prager, 166 Cal. 450, 137 Pac. 37. Where a testator in a will not disposing of any property, expresses a wish that the property shall be considered as community property, such wish is not controlling, and in such case courts would have to consider property separate property if found to be such.—In re Claiborne's Estate, 158 Cal. 646, 112 Pac. 278. Where a testator makes a devise of both separate and community property to his wife, and does not declare the same to be in lieu of her community right, the fact that she also claims the right to succeed to one-half of certain other community property devised to others than herself does not preclude her from taking the property devised to her.—Estate of Prager, 166 Cal. 450, 137 Pac. 37. Where a testator, who died leaving a surviving wife and a brother and sister as his only heirs, provided by his will that his property, all of which was community, should go to his wife during her life and upon her death, "after deducting the portion of which she is legally entitled under the laws of the state of California," the remainder should be equally divided among his brothers and sisters, or their descendants, according to the laws of distribution, the "remainder" to which the brother and sister are entitled is a one-half interest in the entire com-

munity property, the other one-half interest only going to the wife's heirs or as she might direct by will or otherwise.—Estate of Roach, 159 Cal. 260, 113 Pac. 373. A testator who expresses the intention that his separate estate shall be regarded as included in the community property, and thereupon devises and bequeaths to his wife "one-half of all the property, real, personal, and mixed, of which I shall die seised or possessed," means thereby that his wife is to have one-half of his separate as well as one-half of the community property.—In re Dargle's Estate, Appeal of Chapman, 179 Cal. 418, 177 Pac. 165. If a testator says, in his will, "I hereby admit, state, and declare that all my estate is community property, having been acquired by me since my marriage with my said wife," and proceeds to say he "realizes" that the wife "is entitled by law" to a full one-half of all said estate, wherefore he intentionally makes no other provision for her, he is to be understood as leaving her one-half his estate without regard to whether it is community or not.—Estate of Hartenbower, 176 Cal. 400, 168 Pac. 560. Where a wife inherited an estate from her deceased husband, such estate having been acquired by the joint industry of the husband and wife during coverture, the surviving wife, who died after her husband, was not precluded from disposing of such property by will.—Black v. Haynes, 45 Okla. 363, 145 Pac. 362. A testator who, his wife being alive at the time, bequeaths to her one-half of all the property "possessed" by him, and adds the words, "being the same portion to which she would be entitled in the event of all of my property being community property," means that his wife shall take one-half of the total amount produced by adding his separate property to the community property.—In re Dargle's Estate, Appeal of Chapman, 179 Cal. 418, 177 Pac. 165.

22. Election by widow.

(1) In general.—The deceased may so frame his will that his widow can not have the benefits given her by statute, and she will then be put to her election as to which she will take. But when she repudiates the will, she is entitled to the benefit of her statutory rights as fully and completely as if there had been no will.—Estate of Bump, 152 Cal. 274, 92 Pac. 643; Estate of Lufkin, 131 Cal. 293, 63 Pac. 469. An election of a widow not to take under the will is in no sense a contest of the will or of its probate; and, where the widow was named as executrix, caused the will to be probated, and was appointed and qualified as such executrix, she is not estopped to make such election after the expiration of the time fixed by the law in which a contest may be entered.—Estate of Gwin, 77 Cal. 313, 19 Pac. 527, 528. A widow is not estopped to make her election to take under the law by causing the will to be probated and becoming the executrix thereof.—Estate of Frey, 52 Cal. 658. Under the Utah statute, where the estate is solvent, the wife, upon declining to accept under the provisions of the will, and making her election, is entitled to one-third of all the legal and equitable real property, but not to a one-third of the personal property,

or homestead right.—*In re Little's Estate*, 22 Utah 204, 61 Pac. 899, 900. Where a statute points out the course to be pursued by a widow in relation to the probate of the will, and her election to take thereunder, a substantial compliance therewith must be had in order to make an election to take under the will binding. The law provides, where she fails to make her election to take under the will, that she shall take such share of the husband's estate as she would have been entitled to had he died intestate.—*James v. Dunstan*, 38 Kan. 289, 5 Am. St. Rep. 741, 16 Pac. 459, 461. The Kansas statute, relating to the election, by a widow, to accept the provisions of her husband's will, or to take what she is entitled to under the law of descents and distributions, applies also to a husband for whom provision is made by the will of his deceased wife. The statute reads: "If no provision be made for a widow in the will of her husband, and she shall not have consented thereto in writing, it shall be the duty of the probate court forthwith after the probate of such will, to issue a citation to said widow to appear and make her election, whether she will accept such provision or take what she is entitled to under the provisions of the law concerning descents and distribution, and said election shall be made within thirty days after the service of the citation aforesaid; but she shall not be entitled to both."—*Moore v. Herd*, 76 Kan. 826, 93 Pac. 157. The consent of the wife, to take under the will, is not required to be executed, under the Kansas statutes, in the presence of two subscribing witnesses, but simply in the presence of two witnesses; and, if the consent be executed in the presence of two witnesses, it is binding upon her, and can not, after the death of her husband, be repudiated or avoided.—*Neuber v. Shoel*, 8 Kan. App. 845, 55 Pac. 350, 351. In case of an election by a widow to take under the will of her deceased husband it is essential that the probate court explain to her its provisions and her rights under it and also her rights under the law in the event of her refusal to take under the will. But in case of a written consent by her that the husband dispose of more than one-half of his property to others than his wife it is only essential that she act freely and understandingly.—*Weisner v. Weisner*, 89 Kan. 352, 131 Pac. 608. In the absence of any statute fixing the time in which a widow is to make her election she may make the same at any time, and lapse of time will not affect her right to take under the law.—*Hodgkins v. Ashby*, 56 Colo. 553, 139 Pac. 541. It is presumed that a testatrix knew that her power of disposition was subordinate to power of court to carve out a homestead for a limited period from her separate estate.—*In re Gray's Estate*, 159 Cal. 159, 112 Pac. 890.

REFERENCES.

Effect of widow's death before election.—See note 2 L. R. A. (N. S.) 959-960. Effect, on administrator, of widow's election.—See note 4 L. R. A. (N. S.) 1065-1072. Election to take under will.—See note 7 L. R. A. 454. Right of one's creditors or personal representatives to make or control election for or against a will, or between different

provisions of a will or statute.—See note 11 L. R. A. (N. S.) 379-383. Wills, rule of election between inconsistent rights.—See note 12 L. R. A. 227-231. Acceleration of gift over by widow's election against will giving life estate.—See note 18 L. R. A. (N. S.) 272-277. Effect of spouse's election to take against will upon rest of will.—See note 27 L. R. A. (N. S.) 602. Election to take under will.—See note, ante, on law of succession. Who may elect against will in behalf of insane widow.—See note 35 L. R. A. (N. S.) 1210, 49 L. R. A. (N. S.) 1108.

(2) Language of the will.—A will may be so framed as to put either the surviving spouse or any heir, to his election whether he will take under the will or surrender his rights under it and take what the statute grants.—Estate of Gray, 159 Cal. 159, 112 Pac. 890. The mere fact that provision, however liberal, is made in the will for the wife, is not enough to justify the conclusion that such provision was intended to be in lieu of her interest as survivor of the community; the widow's obligation to elect arises only where the testator has, by the terms of the will, clearly manifested the intention to make the testamentary gift to her stand in lieu of her interest in the community property.—Estate of Prager, 166 Cal. 450, 137 Pac. 37. Where the will of a married woman contains no language designed to put the surviving husband to his election between a pecuniary legacy and his statutory right to a homestead in her separate property, the husband is not put to an election from the mere fact that the property out of which the homestead was granted was specifically devised to a third person.—Estate of Gray, 159 Cal. 159, 112 Pac. 890. No presumption arises from the fact of the devise, that the testatrix meant thereby to force an election upon her husband. The presumption is that she executed her will with knowledge that her power of disposition was subordinate to the power of the court to carve out a homestead for a limited period from her separate estate.—Estate of Gray, 159 Cal. 159, 112 Pac. 890. Extrinsic evidence is not admissible to establish intention of testator to dispose of property over which he had no power of disposition, for the purpose of forcing an election by the donee between an independent interest and the testamentary provision.—Herrick v. Miller, 69 Wash. 456, 125 Pac. 976. That property out of which homestead was granted to husband was devised to testatrix's sister and husband was given \$1000, held not sufficient to require election.—In re Gray's Estate, 159 Cal. 159, 112 Pac. 890.

(3) Family allowance.—A will may be so drawn as to put the widow to her election between taking the benefits given her by the testator and claiming her right of family allowance. So, too, the wife may, by agreement, surrender the privilege of applying for an allowance. Whether the right to demand an allowance is inconsistent with the will or has been surrendered, is a question of interpretation of the will or the contract.—Estate of Whitney, 171 Cal. 750, 154 Pac. 855. It is not within the power of the husband, by any provision of his will, to deprive the widow of her right to a family allowance from the estate

under the statutes, or in anywise to limit the power of the court in the exercise of its proper discretion to fix the amount to be allowed. But, of course, he may so frame his will that she can not have the benefits thereby given her and those of the statutes also, and she will then be put to her election which she will take.—In *re Cowell's Estate*, 164 Cal. 636, 130 Pac. 209. It is not essential to the imposition of the duty of election by the widow between the provisions of the will and the statutory allowance that a declaration to the effect above stated should be expressly made. It is sufficient that it should clearly appear from the language of the will that such was the intention of the testator.—In *re Cowell's Estate*, 164 Cal. 636, 130 Pac. 209. In the absence of such an express declaration there is no presumption of an intention on the part of the testator to put the widow to her election. To accomplish this result it must clearly and unequivocally appear that the provision made by the will was intended to be in lieu of such rights as are given by the law.—In *re Cowell's Estate*, 164 Cal. 636, 130 Pac. 209. Where an order granting an allowance had been made in favor of the widow of deceased, on appeal from such order by the residuary legatees, evidence held to show that the testator did not intend any provision of the will to be in lieu of her right to an allowance as provided by statute.—In *re Cowell's Estate*, 164 Cal. 636, 130 Pac. 209.

(4) Taking both by descent and under the will.—Unless there is a clear manifestation of an intent to devise the whole of the community property, the wife may claim and take both what the law gives her in the community property and also what is given her by the will of her husband in that portion thereof subject to his testamentary disposition. It is only where there is such a clear manifestation of intent to devise the whole community property as to overcome the presumption that he did not intend to devise any property over which he had no power of testamentary disposition, that the wife can be put to her election either to take under the will or to take what she is entitled to by law.—*Estate of Gilmore*, 81 Cal. 240, 243, 22 Pac. 655. In the absence of a statute to the contrary, a wife might claim the half of her deceased husband's estate, under the law of descents and distributions, and also take the benefit of his will. The husband may do the same with respect to his deceased wife's estate, where the law gives each the same interest in the other's property.—*Moore v. Herd*, 76 Kan. 826, 93 Pac. 157, 158. A settlement and compromise between the widow and the other beneficiaries under the will, to the effect that she should take under the will as well as survivor of the community, estops them from asserting the contrary.—*Estate of Prager*, 166 Cal. 450, 137 Pac. 37.

REFERENCES.

Taking under the statute, and not by will.—See note, ante, on the law of succession.

(5) Where dower right prevails.—Under the Montana statute, which provides for dower rights of the widow, or for an election under the

will, where the widow has not renounced her rights under the will, but, on the contrary, has taken thereunder, she is barred from claiming dower.—*Chadwick v. Tatem*, 9 Mont. 354, 18 Am. St. Rep. 745, 8 L. R. A. 753, 23 Pac. 729, 732. When a widow fails to make an election she is held to take the share she would have taken if her husband had died intestate.—*Williams v. Campbell*, 85 Kan. 631, 118 Pac. 1074.

REFERENCES.

Election between right of dower and benefits of a will may be compelled when.—See note 92 Am. St. Rep. 695-705. Necessity of electing between claiming own property which the will attempts to dispose of and a legacy or devise in lieu of dower or other fixed right.—See note 42 L. R. A. (N. S.) 1127. Election by widow between benefits of will and rights to dower or community property.—See note in 92 Am. St. Rep. 695. Presumption that widow took her dower right instead of under the will.—See note, ante, on dower and curtesy.

(6) Effect of election.—The widow's election, or renunciation of a right under the will, does not nullify the will as to other bequests, nor take from the legatees therein their rights under the same. Except as to the widow, the will is operative and binding.—In *re Little's Estate*, 22 Utah 204, 61 Pac. 899, 901. When the wife repudiates the will, and elects not to take thereunder, she is entitled to take to the extent of her statutory rights as fully and completely as if there had been no will.—*Estate of Bump*, 152 Cal. 274, 92 Pac. 643, 644. Where the widow renounces under the will, and elects to take under the statute, the effect of this and the birth of the testator's child after the making of the will, though not revoking that instrument, renders its devises and legacies nugatory, and the wife and child become entitled each to one-half of the property of the estate under the statute.—In *re Hobson's Estate*, 40 Colo. 332, 91 Pac. 929, 930. A wife's written acceptance of the terms of her husband's will, together with her written consent that such will be probated at the proper time, such acceptance and consent being attached to the will, is merely an election to take under the terms thereof, in lieu of her right to inherit under the statute; the terms of the will are not thereby enlarged or diminished.—*Bacus v. Burns*, 48 Okla. 285, 149 Pac. 1115, 48 Okla. 134, 149 Pac. 1118.

(7) Election under mistake or misapprehension.—The acts and declarations relied upon, to prove an election by the widow to take under the will, must be unequivocal, and must clearly evince an intention to elect and take under the will. The choice must be made by the widow with full knowledge of her rights and of the status of the estate.—*Reville v. Dubach*, 60 Kan. 572, 57 Pac. 522, 523. Where the widow executes an instrument of so-called election or waiver under the will, and there is nothing in the terms of the will to indicate an intention on the part of the testator to dispose of the widow's share of the community property, and the purported waiver was executed under a misapprehension of her rights, as disclosed by the will itself, such so-called

election or waiver is wholly void.—Estate of Wickersham, 138 Cal. 355, 70 Pac. 1076, 1078. When the owner of an estate, in an instrument of donation, either deed or will, uses language with reference to the property of another which if that property were his own would amount to an effectual disposition of it to a third person, and by the same instrument gives a portion of his own estate to that same owner whose rights of ownership he had thus assumed to transfer, such owner and donee is put to an election between his claim of title to the property so assumed to be disposed of by the donor and his right as donee under the instrument.—Herrick v. Miller, 69 Wash. 456, 125 Pac. 976.

(8) Election by acceptance of devise.—Where the testator devises to his wife "one-half of all my estate," etc., and the widow accepts the devises and bequests provided for her by the will, she thereby makes her election and confirms the disposition made by her husband of the common property.—Estate of Stewart, 74 Cal. 98, 15 Pac. 445, 447 (McFarland, Thornton, and Sharpstein, JJ., dissenting). Where a testator disposes of his estate by will, from which it appears that his evident intent was to embrace not only his separate property, but also the entire community property, his widow is not compelled to accept the provision made for her, but may repudiate the will entirely, and then insist upon the share of the estate which the law allows her. But in such a case, she is put to her election, and if the distribution is made in accordance with the will, it will be presumed that the widow chose the provisions of the will, although the record fails to expressly disclose whether she made any election or not.—Estate of Vogt, 154 Cal. 508, 98 Pac. 265.

(9) Election by acts in pais.—An election by a widow to take under the will, is not required to be proved by the record as to such election, and estoppel in pais may be proved and held effectual.—Reville v. Dubach, 60 Kan. 572, 57 Pac. 522, 523. An election by a widow, to take under a will, may be made by an act in pais, and if the act is plain and unequivocal, and done with full knowledge of the widow's rights, and of the condition of the estate, such election is as binding as though it were formally made.—Reville v. Dubach, 60 Kan. 572, 57 Pac. 522, 523. An election to take under a will, may be inferred or implied from the conduct of the party, his acts, omissions, modes of dealing with the property, acceptance of rents and profits, and the like.—Owens v. Andrews, 17 N. M. 597, 49 L. R. A. (N. S.) 1072, 131 Pac. 1004. In order to constitute an implied election or election in pais it must be clear that the person alleged to have elected was aware of the nature and extent of his rights and it must be shown that having that knowledge he intended to elect.—Hodgkins v. Ashby, 56 Colo. 553, 139 Pac. 538, 542. The principal rule of law precluding the revocation of an election is necessarily the doctrine of estoppel, and there can be no estoppel where there is no injury.—Owens v. Andrews, 17 N. M. 597, 49 L. R. A. (N. S.) 1072, 131 Pac. 1004.

23. Vesting and divesting of estates.

(1) In general.—A will speaks from the death of the testator, and not from its date, unless its language, by a fair construction, indicates a contrary intention.—*Morse v. Macrum*, 22 Or. 229, 29 Pac. 615. Under the common law, a will takes effect at the death of the testator, unless its language, by a fair construction, indicates otherwise, and a legacy or bequest provided for therein does not become vested until that time.—*Scott v. Ford*, 52 Or. 288, 97 Pac. 99, 101. If the testator has acquired other property than that mentioned in the will, it passes by the will; and if conveyances which he gave are void, the title never having passed from the testator, it passes by the will.—*Woodward v. Woodward*, 33 Colo. 457, 81 Pac. 322, 323. Every will furnishes its own law. The language of such instruments is so various that only the most general rules can be laid down for guidance in their interpretation. One of these rules is that the law favors the vesting of estates, and the intent to create a contingent remainder will not be presumed, but must be clearly expressed.—*McLaughlin v. Penney*, 65 Kan. 523, 70 Pac. 341, 344. When an estate is given or granted to several persons jointly, without any expression indicating an intention that it shall be divided among them, it must be construed to be a joint tenancy.—*Noble v. Teeple*, 58 Kan. 398, 49 Pac. 598, 599. Will construed as not giving any present vested interest or estate in the property in contest.—*Demartini v. Allegretti*, 146 Cal. 214, 79 Pac. 871. A will devising an undivided one-half interest to the husband of the testatrix construed as vesting in the husband title to the lands therein described, subject to the trust imposed by the will, even though it did not take effect for all purposes until the will was probated. When probated, the title relates back to the death of the testator.—*Christofferson v. Pfemmig*, 16 Wash. 491, 48 Pac. 264, 265. Under a will which directly devised to the six sons of the testator all of his real estate, share and share alike, and provided that no portion thereof should be sold until ten years after his death and that, should any of the sons contract certain enumerated bad habits before such division his share should be forfeited, or should he die before such division, his share should be divided in a specific manner, each of the sons acquired a vested interest at the time of the testator's death in the undivided share devised to him, subject to divestiture or termination upon the happening of the subsequent act or event specified in the will. Such vested interest could be transferred by the devisee.—*Newlove v. Mercantile Trust Co.*, 156 Cal. 657, 105 Pac. 971. A legacy or an interest created by devise should always be construed as vested rather than contingent. Where a testator devised all of his real property to his wife for life, directing that part of it should be sold at her death, and out of the proceeds a legacy should be paid to his daughter, the interest of the daughter in the legacy vested at the death of the testator and the daughter's death prior to that of the wife did not cause a lapse of her legacy which passed to her heirs.—*Stevens v. Carroll*, 64 Or. 417, L. R. A. 1918E, 1095, 129 Pac. 1044, 1045. A will

takes effect at the death of the testator and its existence does not impair his power over the property during his life.—*Boye v. Andrews*, 10 Cal. App. 494, 102 Pac. 551. Testamentary dispositions, devises, and bequests to a person on attaining majority are presumed to vest at the testator's death.—*Estate of Budd*, 166 Cal. 286, 135 Pac. 1131. The making of a will does not prevent a conveyance of willed property prior thereto.—*Boye v. Andrews*, 10 Cal. App. 494, 102 Pac. 551. The estate of a decedent vests in his heirs or devisees and legatees immediately upon his death, and such devisees and legatees do not derive title from the decree of distribution but from the will.—*Western Pac. Ry. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284. A legatee of corporation stock who accepts such stock on distribution is the owner thereof from the date of the death of the testator.—*Western Pac. Ry. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284. When a future estate, attempted to be created by will, fails because it offends the rule against perpetuities, the property thus ineffectually disposed of vests at once in the heir or heirs at law; and a rent charge on the abortive future estate during the illegal interim of suspension falls therewith.—*Lasnier v. Berthiaume*, 102 Kan. 551, 555, 171 Pac. 645; *Lasnier v. Martin*, 102 Kan. 551, 555, 171 Pac. 645. Testamentary dispositions, including devises and bequests to a person on attaining majority are presumed to vest on the testator's death and upon the date of distribution, and the offense of embezzlement of such a legacy may be committed at any time after the testator's death, and is not limited to the period following order of distribution.—*People v. Dates*, 29 Cal. App. 260, 263, 155 Pac. 112.

REFERENCES.

When legacies are vested, and when contingent.—See note in 10 Am. St. Rep. 471.

Where the will of one of three brothers recited a partnership with his two brothers and made provision for the undisturbed management of the partnership business by them during life, and that his interest in such business should go to his daughter upon the death of his wife, but provided that the property should not "vest" in such daughter until the death of his brothers; held, the word "vest" was used in the same sense as taking of possession, and not that the title did not vest if the brothers were alive when the wife died.—*In re Glann's Estate*, 177 Cal. 347, 170 Pac. 833, 834. Where a legacy or devise is given to a person to be paid at a future time, it vests immediately; but when it is not given until a future time, it is contingent, and does not vest until that time arrives.—*Estate of Whitney*, 176 Cal. 12, 167 Pac. 399. One to whom land is devised by will can take thereby no estate greater than that of the testator.—*Phillis v. Gross*, 32 S. D. 438, 445, 456, 143 N. W. 373. Under the laws of Kansas, as construed by that state's supreme court, a provision in a will which gives the first taker under it an absolute right to dispose of the property enables such taker to deprive the remaindermen of their interest.—*Lucas v. McNeill* (Kan.), 231 Fed.

672, 674, 145 C. C. A. 558. Where, under a will, legacies are given to employees of the testator's business enterprise who have been so for a stated number of years, and the will recites in that connection, "In all cases these dates are as of January 1st, 1911," an employee need not prove that he was working on that particular day in order to take the legacy.—Estate of Cowell, 170 Cal. 364, 149 Pac. 809. The title of a mortgagor's non-resident heir is not divested by a foreclosure and sale in a suit brought by the mortgagee and defended by the administrator of the mortgagor.—Phillips v. Thompson, 73 Wash. 78, Ann. Cas. 1914D, 672, 131 Pac. 461, 463.

REFERENCES.

Consult notes to the following sections of Kerr's Cal. Cyc. Civ. Code, as to the matters indicated.—Conveyances from person claiming by succession, when not impaired by devise from whom succession is claimed, § 1364; devise or legacy to more than one person vests in them as owners in common, § 1350; devises, etc., to a person on attaining majority, are presumed to vest at testator's death, § 1341; death of legatee before testator, lineal descendants to take estate, § 1310. Devestiture of estates of persons not in being.—See note 8 L. R. A. (N. S.) 49-77.

(2) *Intention of the testator.*—Without regard to the words by which legacies are created, where the beneficiaries are living persons and there is no bequest over in the event of death, if such words signify an intent by the testator to give to these beneficiaries the sums named, although the time of payment be postponed and trusts for accumulations created to cover the time of the deferred payment, the legacies vest in the legatees an absolute, indefeasible and disposable estate.—Estate of Yates, 170 Cal. 254, 149 Pac. 555. Where a testator expresses the desire that his wife shall enjoy a life estate in all his property, provided she does not remarry; that on her death described land "shall fall to" a named son; and that she "shall leave the balance" of the real estate to another named son, the intent is that the sons shall be vested with these properties immediately on the wife's death.—In re Estate of Merrigan, 34 S. D. 644, 648, 150 N. W. 285. If the scrivener of a will, in apparent ignorance of what "revert" signifies, has used the word to express the vesting of a remainder, where evidently the testator intended such a vesting, effect should be given to the evident intention.—Mastellar v. Atkinson, 94 Kan. 279, Ann. Cas. 1917B, 502, 146 Pac. 367. A provision in a joint will that "upon the death of either of us, the estate of the other, real, personal and mixed, shall vest in the survivor during the life of the survivor," etc., when read in connection with other parts of the will indicates that the intention meant to be expressed by testators was that the estate of the deceased should vest in the survivor.—In re Brown's Estate, Brown v. Brown, 101 Kan. 335, 340, 166 Pac. 499.

(3) **As to expectancies.**—An heir may convey to the residuary legatees his interest in the estate, but, so far as such conveyance purports to convey his expectant interest in his mother's estate, it is illegal and void.—*Estate of Wickersham*, 138 Cal. 355, 70 Pac. 1076, 1078.

(4) **Property under contract of sale.**—Heirs take subject to the rights of third parties under contracts relating to the property, and made with the deceased before his death. The heir can not take anything more than the deviser had at the time of his death, and the will can not operate to abridge or destroy rights which have already attached to the estate. Where the testator had entered into a contract of sale of property, the only interest that he could have assigned, conveyed, or devised, was the right to the money which represented the purchase price (excepting, of course, the right to rescind under certain contingencies).—*Hyde v. Heller*, 10 Wash. 586, 39 Pac. 249. Direction for sale of all realty, and use of proceeds for a home, held not to include land covered by testatrix's contract of sale made by her after will was made.—*In re Dwyer's Estate*, 159 Cal. 664, 115 Pac. 235. In view of section 1301 of the Civil Code of California, providing that testator's agreement for sale of property previously devised does not revoke testamentary disposal, but that property passes subject to purchaser's remedy on contract, contention that such contract converted land into personalty which would go to legatees held untenable.—*In re Goetz's Estate*, 13 Cal. App. 198, 109 Pac. 145. Power of sale held not to embrace land which testatrix contracted to sell after will was made.—*In re Dwyer's Estate*, 159 Cal. 664, 115 Pac. 235. The Civil Code of California, sections 1301, 1303, providing that a testator's agreement to sell property previously devised shall not revoke disposal but that the property shall pass subject to the remedy of specific performance against devisees, and that conveyance, settlement, or other act of testator altering his interest in the thing previously disposed of by will shall not operate as a revocation, held not applicable to land as to which trustees were given a naked power of sale for founding a home.—*In re Dwyer's Estate*, 159 Cal. 664, 115 Pac. 235.

(5) **Property subject to trust.**—Real estate which is made the subject of a trust by the will, and directed to be sold and turned into money, does not descend to the heir, but the title rests in the trustee, until the purpose of the trust is effected by the actual exchange of the land for money.—*Martin v. Moore (Preston)*, 49 Wash. 288, 94 Pac. 1087, 1089.

(6) **Deeds, and deeds in escrow.**—Where a devise is to a son for life, with remainder to the heirs of his body, and, by the will, each of the testator's children is empowered to control and dispose of his or her share of the testator's estate during his or her life as to each shall seem proper, the son, by a conveyance in fee, after a sale of his share in execution of a judgment, vests the fee absolutely in his grantee.—*Ryan v. Cullen*, 96 Kan. 284, 150 Pac. 597. The placing of a deed by the grantor in the hands of a person other than the grantee, to be de-

livered by such person to the grantee after the grantor's death, conveys no title, unless the intention of the grantor is, that at the moment of parting with the instrument, he parts with all dominion over the property beyond recall.—*Williams v. Kidd*, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1. An instrument delivered in escrow takes effect only on the performance of the prescribed conditions and a second delivery, and is not operative until the conditions are performed and the second delivery is made. Under this doctrine it has been held that where a deed to mining property is placed in escrow, and the testator dies before the performance of the conditions and the second delivery, the estate is "not wholly divested," and title passes by the terms of the will, subject to the right of specific performance of the grantee, in the escrow deed, upon the performance of the conditions.—*Chadwick v. Tatem*, 9 Mont. 354, 364, 23 Pac. 729, 731.

(7) *Remainders*.—If, by a last will and testament, a remainder in fee is vested in a devisee subject to defeasance by a condition subsequent, but prior to the performance of the condition such condition becomes impossible of performance, the vested remainder becomes absolute in the devisee and no longer subject to the defeasance provided for in the will.—*Scott v. Lucas*, 23 Haw. 338, 342. A will gave certain property to the widow of the testator "so long as she shall live or retain her capacity for such business; or shall not become remarried; and when either of such contingencies shall happen, then I direct that all of said property, both real and personal shall at once be distributed among my children and heirs at law, the issue of myself and by said wife, and my said wife, Charsto Strom, as the laws of descent and distribution of the state of Kansas provide and direct"; held, that the will vested a life estate in the widow, subject to be enlarged to a half interest in fee upon remarriage or disability, and vested in the children the remainder in all, subject to being diminished to a vested remainder in one-half upon disability or remarriage of the mother.—*Strom v. Wood*, 100 Kan. 556, 558, 164 Pac. 1100. Estates in remainder limited to take effect upon default in the exercise of a power of appointment reserved in the instrument creating the same, are not prevented from vesting by the existence of the power, but take effect as though no power existed, subject to be divested by an exercise of the power.—*Gray v. Union Trust Co.*, 171 Cal. 637, 643, 154 Pac. 306. Where a testator bequeaths a life estate in his property to his widow and the remainder undivided to his sons, share and share alike, the sons acquire a vested remainder in the property, and they may sell and dispose of their undivided interests, subject to the rights of the widow under her life estate.—*Stevenson v. Stevenson*, 102 Kan. 80, 83, 169 Pac. 552. Where a life tenancy and remainders carved out of an estate by will, and the remaindermen are in esse, definitely ascertained, and nothing but their death before the termination of the life tenancy can defeat their title, the remainders thus created and bestowed by the

will are vested absolutely in the remaindermen.—*Stevenson v. Stevenson*, 102 Kan. 80, 83, 169 Pac. 552.

REFERENCES.

Vesting of remainder in heirs of adopted daughter.—See note, *ante*, on the law of succession, following table after § 41.

(8) *Contingent remainders*.—A devise by a testator to his son, of a remainder, to take effect upon certain conditions, after the termination of a life estate in the testator's wife, vests in the son such an interest in the property, under the terms of his father's will, as would permit him to convey the same by contract.—*Coats v. Harris*, 9 Ida. 458, 75 Pac. 243, 245, 246. Where a will devised property to trustees in trust to pay the income to the surviving widow of the testator and to his married daughter, and to the survivor of them during life, and devised the remainder upon the termination of the trust to the then living children of the married daughter, or her then living grandchildren by right of representation, such devise of the remainder is of a contingent remainder, which does not vest in any child or grandchild of the daughter until her death.—*Estate of Washburn*, 11 Cal. App. 735, 106 Pac. 415. Where a testator bequeathed \$50,000 for a home and hospital in a city named for a building, provided the city or the county would support it, otherwise to revert back to and be divided among certain legatees, on the primary gift being declared void as depending upon an unenforceable condition precedent the money should go to the stated legatees and not to the residuary legatee.—*Board of Regents v. Wilson*, 54 Colo. 510, 131 Pac. 423. Under the provisions of section 4538 of the Rev. Codes of Idaho an action may be maintained by a remainderman for the protection of a contingent remainder, as against one who claims an estate or interest in the property adverse to such remainderman.—*Wilson v. Linder*, 18 Ida. 438, 110 Pac. 274, 138 Am. St. Rep. 213. Where a contingency named in a will, upon which an absolute estate may vest in one devisee as against another, is unlimited as to time, and is such a contingency as may never occur either prior or subsequent to the death of the testator, and might also occur at any time, the contingency should not be limited by construction to the period prior to the death of the testator, so as to exclude therefrom the possibility of that contingency happening during the period subsequent to the death of the testator and prior to the death of the devisee.—*Wilson v. Linder*, 18 Ida. 438, 110 Pac. 274, 138 Am. St. Rep. 213. In the case of a devise, postponed to take effect upon the termination of a particular estate, with a gift over in case of the death of the remainderman "without issue," if there is nothing in the context or in the surrounding circumstances to indicate the intention of the testator, then the ordinary meaning of the words is that the reference is to death at any time it may occur, and that the happening of the contingency is to determine the result.—*Estate of Carothers*, 161 Cal. 588, 119 Pac. 926. The circumstances surrounding the making of the will in question showed that the testator left him surviving as heirs at law

his childless second wife, then aged fifty-six years; a son, William, aged forty-two years and unmarried; another son, John, aged thirty-nine years, having one child; and a daughter, Elizabeth, aged forty-six years, who was married and had three young children. At the time the will was executed the testator was seventy-four years of age, was then very ill, and was expected to die, and did die six days afterward. By the terms of his will he devised his farm, which comprised the bulk of his estate, to his wife and his son William "during the lifetime of my said wife, and at her death said land with all the improvements and proceeds thereof vests absolutely in and is the property of said William, that in case said William dies without issue his property herein specified becomes the property of John, and at his death goes to Elizabeth." Held, that upon the prior death of the wife, the son, William, did not become vested with an unconditional and unqualified fee, but that the fee was limited upon the condition of his dying at any time without issue, and that upon his so dying, subsequent to the death of the wife, the property would pass to John and Elizabeth successively.—*Estate of Carothers*, 161 Cal. 588, 119 Pac. 926.

REFERENCES.

Contingent remainder as subject of devise by remainderman.—See note 21 L. R. A. (N. S.) 121. Expectant and contingent interests in real property as subject of attachment or levy on execution.—See note 30 L. R. A. (N. S.) 115. To what time is the contingency of death of a legatee or devisee without child or issue, upon which a gift is conditioned, referable.—See note 25 L. R. A. (N. S.) 1045. Whether the heirs who take under a possibility of reverter are determined at the time of the ancestor's death or at time of the termination of the fee.—See note 18 L. R. A. (N. S.) 624-627.

(9) *Lapsed legacies and devises.*—The postponement of payment of legacies, that the testator's estate shall be kept, does not necessarily preclude the vesting of the legacies, under the rule that, if a legacy does not vest in the lifetime of the legatee, it lapses into the estate out of which it was to be paid, or passes over to some other named legatees or devisees.—*McLaughlin v. Penney*, 65 Kan. 523, 70 Pac. 341, 344. A legacy lapses when the devisee dies before the testator, and there is no other person authorized to take under the will.—*Shadden v. Hembree*, 17 Or. 14, 18 Pac. 572, 576. If a legatee dies before the testator, the legacy lapses and falls into the body of the estate, and is not payable to his executor or administrator.—*Scott v. Ford*, 52 Or. 288, 97 Pac. 99, 101. The Civil Code of California abrogates the old common-law distinction, between devises of real property and bequests of personal property, to the effect that a devise speaks from the date of the will and a bequest from the death of the testator, and, according to which distinction, it was generally held that property mentioned in a void or lapsed devise did not go to the residuary devisee. Under the code, lapsed devises go to the residuary devisee. Under the old authorities, before any change was made by statute, it was

uniformly held that lapsed bequests went to the residuary legatee, and not to the heir. In New York, the statutory law is, that a will which in terms disposes of all the testator's real property shall be construed to pass all the real property which he was entitled to devise at the time of his death; and under that statute it has been uniformly held, in that state, that property mentioned in a lapsed devise goes to the residuary devisee, and not to the heir, unless a contrary intent is clearly expressed in the will. The statutory provisions of California are clear to the point that lapsed devises take the same course as lapsed bequests.—*Estate of Upham* 127 Cal. 90, 53 Pac. 315, 316. A provision in a will giving property to a local camp of Modern Woodmen is not void because the will was witnessed by members of such camp; but fraternal insurance orders being under the rules and restrictions of the statute, such local camp is not competent to take and hold property given to it by will, its legal source of income being dues, premiums, and assessments. When a testator has attempted to devise and bequeath to such camp real and personal property, his heirs may assert the invalidity of such provision and the inability of the camp to take thereunder.—*Kenneth v. Kidd*, 87 Kan. 652, Ann. Cas. 1914A, 592, 44 L. R. A. (N. S.) 544, 125 Pac. 36. Prior to the 1905 amendment section 1310 of the Civil Code of California, legacies, as distinguished from devises, lapsed by the legatee's death before that of the testator.—*In re Goetz's Estate*, 13 Cal. App. 292, 109 Pac. 492. Section 1310 of the Civil Code of California, as amended in 1905, giving lineal descendants of relatives dying before the testator what the relatives would have taken by will, does not apply where the contrary intent is expressed in the will.—*In re Goetz's Estate*, 13 Cal. App. 292, 109 Pac. 492. That section was held not applicable where the will had a clause in these words: "and devise so bequeathed by me should die, prior to my death the legacies, to them mentioned in this will shall lapse, and such legacies shall form a part of my residuary estate."—*In re Goetz's Estate*, 13 Cal. App. 292, 109 Pac. 492. Under section 1343 of the Civil Code of California, declaring that a legacy shall not fail by the death of a legatee before the testator, where the will shows an intention to substitute some other person, a legacy to a sister, but, in case of her death prior to receiving the legacy, to certain of her children, did not lapse by the sister's death.—*In re Heberle's Estate*, 155 Cal. 723, 102 Pac. 935. The death of a wife before the testator held not to defeat the right of grandchildren to take under a will giving them personalty on the termination of a life trust for the wife's benefit.—*In re Gregory's Estate*, 12 Cal. App. 309, 107 Pac. 566. Legacies to strangers in blood, who predeceased testatrix became a part of the undisposed residuum of the estate and would pass to the heirs at law.—*Estate of Kunkler*, 163 Cal. 797, 127 Pac. 43. A will disposing of a certain portion of an estate, and providing that the residue should be reduced to cash and divided among certain named legatees in named proportions, will not be construed as creating a

class, so that upon the death of one his portion would pass ratably to the others, but rather would such legacy be considered to have lapsed and pass to the lineal descendants of the testator, according to the statutes of descent and distribution.—Estate of Kunkler, 163 Cal. 797, 127 Pac. 43.

REFERENCES.

Death of devisee or legatee during lifetime of testator, effect of.—See note Kerr's Cal. Cyc. Civ. Code, § 1343. Death of devisee of limited interest before testator's death, effect of.—See note Kerr's Cal. Cyc. Civ. Code, § 1344. Devolution of lapsed legacy or devise where will contains a residuary clause.—See note 44 L. R. A. (N. S.) 789.

(10) *Altered circumstances.*—"If a will devises nothing but a particular piece of land, and the testator afterwards sells that land, a revocation of the devise may be implied; and so if a testament simply bequeaths specific chattels which are otherwise disposed of during one's life, there remains, at all events, nothing for his will to operate upon. But one's estate may over and over again change in value and specific character between the date of executing it and his death. The proportions as between various beneficiaries may greatly change beyond what he had intended. He may part with this piece of property and acquire that. One object of his bounty may die, and another may come into existence. He may even die so involved in debt, or utterly bankrupt, as in effect to annihilate the gifts which his own testament professes to bestow. All this, however, does not, at our day, revoke in any such sense as to set the instrument practically aside in whole or in part, or disentitle it to probate. The testator's appointment of executor still takes effect. His scheme of disposition is not superseded in form; it only becomes a matter of practical administration, assisted by legal construction of the will, to determine how far and in what proportions his gifts may have failed, if they fail at all, under his unrevoked testament. . . . In short, revocation of a particular will by mere inference of law or presumption is limited to a very few instances in our modern practice; while, on the other hand, changes in the condition of the testator's affairs, or through the mortal chances to which he and his beneficiaries are exposed, may work out a very different settlement and distribution of his estate after his death from what the will purported to arrange. Modern legislation itself repudiates in England and some of our states the whole theory of a presumed intention to revoke on the ground of an alteration in circumstances; and what is left of that theory, aside from such statutes, it would be very difficult to say."—Woodward v. Woodward, 33 Colo. 457, 81 Pac. 322, 323; quoting from Schouler on Wills, section 427.

(11) *Forfeiture of legacies.*—Provisions forfeiting the interests of contesting devisees are valid and will be enforced.—In re Hite's Estate, 155 Cal. 436, 17 Ann. Cas. 993, 21 L. R. A. (N. S.) 953, 101 Pac. 443. Contest worked a forfeiture though there was no gift over.—In re

Hite's Estate, 155 Cal. 436, 17 Ann. Cas. 993, 21 L. R. A. (N. S.) 953, 101 Pac. 443. Forfeiture provision applicable to codicils and forfeiture not prevented by rule of strict construction against forfeitures or by the California Civil Code, section 1342, providing that testamentary dispositions shall not be divested except on occurrence of precise contingency prescribed by the testator.—*In re Hite's Estate*, 155 Cal. 436, 17 Ann. Cas. 993, 21 L. R. A. (N. S.) 953, 101 Pac. 443. The filing of an opposition to the probate of a will whose codicil reduced the opposer's bequest, moving to strike parts of proponent's answer, etc., held "contest" so as to forfeit bequest.—*In re Hite's Estate*, 155 Cal. 436, 17 Ann. Cas. 993, 21 L. R. A. (N. S.) 953, 101 Pac. 443. Testator's meaning of word "contest" is controlling.—*In re Hite's Estate*, 155 Cal. 436, 17 Ann. Cas. 993, 21 L. R. A. (N. S.) 953, 101 Pac. 443. A provision forfeiting the legacy of any contestant held not contrary to public policy.—*In re Miller's Estate*, 156 Cal. 119, 23 L. R. A. (N. S.) 868, 103 Pac. 842. A widow unsuccessfully contesting will held to forfeit legacy though she had reasonable cause.—*In re Miller's Estate*, 156 Cal. 119, 23 L. R. A. (N. S.) 868, 103 Pac. 842. One does not forfeit a legacy of personalty because as to realty he accepts a decree of distribution inconsistent with the will.—*In re Learned's Estate*, 156 Cal. 309, 104 Pac. 315.

24. What property passes, and how.

(1) **In general.**—A transfer of stock passes all dividends thereon subsequently declared, but a legatee of stock takes the latter in its character as of the time of the testator's death.—*In re Wilson's Estate*, 85 Or. 604, 167 Pac. 580; *Mackin v. Noad*, 86 Or. 221, 167 Pac. 585. Where a will contains a provision purporting to devise real estate to several persons, followed by a direction that it be sold by the executor and that the proceeds be divided equally among such persons, the right with respect to such property acquired by one of them is subject to the lien of a judgment existing against him at the time of the testator's death.—*Penalosa State Bank v. Murray*, 86 Kan. 766, 39 L. R. A. (N. S.) 817, 121 Pac. 1117. If all of the property left by a testator was community, and he devised one-half of the property to his wife, she takes her share of the property free of all debts, demands, and charges against the estate, where that appears to have been the intention of the testator and that they should be payable from his part of the estate.—*Redelsheimer v. Zepin*, 105 Wash. 199, 177 Pac. 736. Where, in 1901, a full-blood Creek Indian executed a will in proper form, devising to his wife all his property, real, personal, and mixed, and all that he was entitled to as a citizen of the Creek nation, which will was duly admitted to probate after the death of the testator in August, 1906, such will was effective to pass all the property of the testator to the devisee.—*Wilson v. Greer*, 50 Okla. 387, 151 Pac. 629.

(2) **Estates tail in Kansas.**—Estates tail still exist in the state of Kansas, and where a testator devised specific tracts of land to each of four children and to the heirs of the body of the particular devisee

and by the residuary clause bequeathed all personal property to his surviving children, share and share alike, it was held that the children took an estate tail by the devise and one of them having died after the testator but without children acquired an undivided interest in the reversion in fee expectant on her death without issue, which interest on her death passed to her husband.—*Ewing v. Nesbitt*, 88 Kan. 708, 129 Pac. 1131.

(3) **Interests in estate.**—A bequest in a will of all the testator's "interest in the estate" of a named decedent will be construed to pass not only such interest as vested in him as a beneficiary of such estate, but also such further interests as he may have acquired in the property thereof by succession or bequest from other beneficiaries, where such estate was in process of administration at the time of the death of the testator, and his interests therein constituted the whole of the property left by him.—*Estate of O'Gorman*, 161 Cal. 654, 120 Pac. 33.

(4) **Charge upon estate.**—If all of a testator's estate is devised to a residuary legatee, except two small legacies, with a direction that such legatee pay to an annuitant a designated sum monthly during the latter's lifetime and makes the same a charge upon the estate, the transfer is to the residuary legatee, who takes subject to the charge, which is a lien upon the estate.—*Estate of Brown*, 24 Haw. 443, 445. A devise to the testator's son, subject to his mother's life estate, and to his paying \$1500 to each of his sisters, does not involve a suspension of the power of alienation; such provision is a mere charge; the devise is not upon condition, either precedent or subsequent.—*In re Estate of Gray*, 27 N. D. 417, 430, L. R. A. 1917A, 611, 146 N. W. 722.

REFERENCES.

Admissibility of extrinsic evidence for the purpose of charging property with the payment of legacies or debts where the will is silent on that point.—19 L. R. A. (N. S.) 457. Remedies for the enforcement of a legacy when charged on a devise.—30 L. R. A. (N. S.) 815.

(5) **Right to income, rents, and profits.**—In case an estate vests immediately in a devisee, because of the invalidity of attempted limitations, the income and use of the property follow the fee.—*Estate of Budd*, 166 Cal. 286, 135 Pac. 1131. A testator, both at the time of execution of his will and of his death, had surviving one son and two daughters, and two grandchildren, the issue respectively of a deceased son and daughter. By his will, after giving pecuniary legacies of \$75,000 to each of such grandchildren, he left the entire residue of his estate to a trustee in trust to pay one-third of the net income thereof to each of his surviving children during his or her natural life, and "upon the death of either of said children without issue, to pay his or her one-third share of said net income to the survivors of them, share and share alike, and to the children of any deceased child by right of representation." The will further provided that upon the death of either of said children leaving issue, one-third of the original trust

estate with its accretions shall at once descend to and vest in the issue of such deceased child, and upon the death of the last survivor of said children, all the property and estate representing the one-third share or interest of any child who may have died without issue shall vest absolutely in and go to the heirs at law of such child so dying without issue. The court held that upon the death of the surviving son, without issue, the one-third share of the net income of the trust estate which would have gone to him had he continued to live passed to the surviving daughters of the testator, to the exclusion of the children of the children of the testator who had died prior to his death.—*Bemis v. Cookson*, 160 Cal. 743, sub. nom. *Cookson v. Hamilton*, 118 Pac. 116. A devisee of a life estate in the income of property, where there are no words of explanation or limitation in the devise creating the estate, is entitled to the income without diminution by the payment of the debts, funeral expenses, and costs of administration; but, if he knowingly participates in such payments, he is a volunteer, and his heirs will not be allowed to question such participation.—*Stahl v. Schwartz*, 81 Wash. 293, 142 Pac. 651. Where the income from certain property devised in trust to the children and certain named grandchildren of the testator in equal shares the beneficiaries will take per capita unless the will shows a different intent on the part of the testator.—*Lidgate v. Danford*, 23 Haw. 317, 324. The beneficiaries under a will have accruing to them the income, rents, and profits of the property they take as well as the property itself; unless the will disposes otherwise.—*Maling v. Maling* (Or.), 217 Fed. 127, 130. Where a will provides for the payment to the testator's widow for life of a share of the income of the residue of the estate which is devised in trust, such income upon her death to be paid to the other beneficiaries, and the widow elects, to take her dower, in the absence of any provision in the will to cover the contingency, the beneficiaries other than the widow, upon the doctrines of compensation and acceleration, became entitled to receive the entire income of the residuary estate remaining.—*Lidgate v. Danford*, 23 Haw. 317, 327. The net rents and profits of real property specifically devised, accruing after the death of the decedent, are a part of such realty, and, if there is sufficient other property primarily liable for the debts and expenses of administration, should be awarded to the devisees.—*Estate of De Bernal*, 165 Cal. 223, Ann. Cas. 1914D, 26, 131 Pac. 375. A testator left him surviving a son, two daughters, and two grandchildren. By his will he left the residue of his estate to a trustee in trust to pay one-third of the net income thereof to each of his surviving children for life, and "upon the death of either of said children without issue, to pay his or her one-third share to the survivors of them, share and share alike, and to the children of any deceased child by the right of representation." The will further provided that upon the death of either of said children leaving issue, one-third of the original trust estate with its accretions shall at once descend to and vest in the issue of such deceased child,

and upon the death of the last surviving of said children all the property and estate representing the one-third share or interest of any child who may have died without issue shall vest absolutely in and go to the heirs at law of such child so dying without issue. Held, that upon the death of the surviving son without issue, the one-third share of the net income which would have gone to him, passed to the surviving daughters to the exclusion of the children of the children of the testator who had died prior to his death.—*Bemis v. Cookson*, 160 Cal. 743, 118 Pac. 116.

(6) **Disposition of excess.**—Where a testator had 17 nieces and nephews, all of whom he regarded with equal affection, but he made provision in his will that, after all devisees and legatees were fully paid, the residue of his estate, if any, should be divided among certain named nephews and nieces, in specified amounts; and where there was a large remainder after paying all bequests specified in the will, but no provision was made in the will for such a contingency; the nephews and nieces named in the will are not entitled to such excess in proportion to the respective amounts bequeathed to them in the will, but the whole thereof must be distributed equally to the heirs at law where there is no indication in the will that the nephews and nieces mentioned therein are to be specially favored.—*In re Seay's Estate*, *Marsh v. Seay* (Cal.), 181 Pac. 58, 59, 4 A. L. R. 343.

25. Descent and distribution.

(1) **In general.**—Where the will of a testatrix devised her property to her husband for life and provided that at his death, the property should be sold and divided equally among the children of her brothers and sisters and among three other persons named, the three persons last named take equally with each of the nephews and nieces per capita.—*Neil v. Stuart*, 102 Kan. 242, 169 Pac. 1138. If a testator devises his real property to his wife for life, and after her death certain portions to his son, and the will provides that if any devisee shall die before such wife dies, his share shall go to his heirs, the estate of the remainderman, where he mortgages the property so devised but dies before the wife, leaving children, his estate, whatever it may have been, terminated with his death, and his children as heirs take it free from any lien of the mortgage.—*Brede v. First Nat. Bank*, 23 Haw. 537, 540. Where a testator devised all his property to his wife for life and then made several specific devises to his children and finally made them his residuary devisees, after the estate had been finally settled and the executors discharged, all the children joined in a warranty deed of the property to the widow. Held, that if the children did not acquire the fee in remainder under the will they did so under the statute of distributions as intestate property and consequently the deed vested the fee in the widow.—*Whitney v. Whitney*, 61 Or. 314, 122 Pac. 290. If a will devises a life interest to the testator's wife, with a remainder in equal shares to their five children, a

provision that, if any of the children should die before the inheritance passed to them, the issue if any of such deceased child should take his share, even if construed to relate to the situation arising from the death of a child after that of the testator and before that of the mother, does not prevent the spouse of a deceased child, who died after the father and before the mother, from inheriting the share of such child.—*Hammond v. Martin*, 100 Kan. 285, 164 Pac. 171. The devise by a full-blood Indian testator of his real estate, which deprives the parent, wife, spouse, or children of such testator of the estate therein to which they or any of them would succeed upon his death intestate, disinherits such parent, wife, spouse, or children, so deprived within the provision of the act of congress of April 26, 1906.—*In re Byford's Will* (Okla.), 165 Pac. 194. The act of congress of April 26, 1906, removed the restrictions on alienation by will of all the property of a full-blood Indian of the Five Civilized Tribes, except that no will of a full-blood Indian, which disinherits the wife, parent, spouse, or children of the testator, is valid unless acknowledged as required by that act.—*Wilson v. Greer*, 50 Okla. 387, 151 Pac. 629. When the wife dies without ever having given her consent to the will of her husband which does not on its face purport to convey away from her more than one-half of his estate, her heirs take one-half of the estate.—*Hodgkins v. Ashby*, 56 Colo. 553, 139 Pac. 538, 541. Where a mother and her daughter were given and bequeathed, the residue of all property of a testatrix, a relative of theirs, and the mother died before the testatrix, the daughter was entitled to all of the realty and to take one-half of the personal property; but as to the other one-half of the personal property, the testatrix died intestate.—*Lewis' Estate*, *In re*, 39 Nev. 445, 4 A. L. R. 241, 159 Pac. 961. An owner of property in fee died leaving a wife as a sole heir at law. By his will he left her during life all the rents accruing, with power to collect them; empowered her, in case of destruction by fire, to use the insurance money and to raise enough, by mortgaging the property, to add to this for the replacing of the burned buildings. On her death the property should go to her children, if she had any, but if she had none living at that time, she might bequeath the property to any person or persons, or to any charity or charitable institution she might choose; but in no case should she be allowed to sell. There was no provision for a remainder over. She was also left residuary devisee and legatee. The decree awarded her a fee simple.—*Drexler v. Washington Dev. Co.*, 172 Cal. 758, 159 Pac. 166. A rule, under the law relating to estates of decedents, whereby the share of a devisee or legatee who dies before the taking effect of the will goes to his "lineal descendants," does not apply where the testator was aware of the death when executing the will.—*In re Hutton's Estate* (Wash.), 180 Pac. 882.

PART XVI.

PROBATE OF WILLS.

CHAPTER I.

PETITION, NOTICE, AND PROOF.

- § 957. Custodian of will to deliver same, to whom.**
- § 958. Who may petition for probate of will.**
- § 959. Contents of petition.**
- § 960. Form. Petition for probate of will.**
- § 961. Form. Petition by corporation for probate of will.**
- § 962. Form. Renunciation by person named in will, of right to letters testamentary.**
- § 963. Executor forfeits right to letters when.**
- § 964. Form. Forfeiture of executor's right to letters.**
- § 965. Production of will in possession of third person.**
- § 966. Form. Petition for production and probate of will in possession of third person.**
- § 967. Form. Order requiring third person having possession of a will to produce it.**
- § 968. Form. Warrant of commitment for failure to produce will.**
- § 969. Notice of petition for probate, how given.**
- § 970. Form. Time fixed by clerk for hearing probate of will and petition for letters testamentary.**
- § 971. Form. Affidavit of posting notice of time set for hearing probate of will.**
- § 972. Form. Affidavit of publication of notice of time and place appointed for probate of will.**
- § 973. Notification to heirs and named executors.**
- § 974. Form. Affidavit of mailing notice to heirs.**
- § 975. Form. Proof of personal service of notice.**
- § 976. Order to enforce production of wills or attendance of witnesses.**
- § 977. Hearing proof of will after proof of service of notice.**
- § 978. Form. Consent of attorney of minors, etc., to probate of will.**
- § 979. Form. Testimony of subscribing witnesses on probate of will.**
- § 980. Form. Testimony of applicant on probate of will.**
- § 981. Who may appear and contest the will.**
- § 982. Admitting will to probate.**
- § 983. Holographic wills.**
- § 984. Form. Certificate of proof of holographic will, and facts found.**

PROBATE OF WILLS.

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 - (2) Prerequisites to jurisdiction.
 - (3) As to non-residents.
 - (4) Issues properly triable.
 - (5) Issues not triable.
 - (6) Destruction of will as affecting.
 - (7) Involves power to postpone hearing.
4. Parties.
 - (1) Who may apply for probate.
 - (2) Who can not oppose probate.
5. Notice of application for probate.
6. Pleadings.
 - (1) Petition for probate.
 - (2) Issues.
7. Burden of proof.
 - (1) In general.
 - (2) Presumption of sanity.
8. Evidence.
 - (1) Testimony of subscribing witnesses.
 - (2) As to mental capacity and undue influence.
 - (3) As to identity of persons misnamed.
 - (4) Wills executed by blind persons.
 - (5) Presumptions as to the will.
 - (6) Alteration of will. Effect of.
 - (7) Will on different sheets of paper.
- (8) Practice and procedure.
9. Order or decree admitting will to probate.
 - (1) In general.
 - (2) Void statute.
 - (3) Effect of decree.
 - (4) Establishes the will prima facie.
 - (5) Conclusiveness of decree.
 - (6) Decree annulling the will.
 - (7) Gives right to letters testamentary.
10. Probate of after-discovered will.
11. What wills can not be admitted to probate.
12. Admission to probate under special act.
13. Probate of holographic will.
 - (1) In general.
 - (2) Instrument entitled to such proof.
 - (3) Instruments not entitled to such proof.
14. Nuncupative wills.
15. Non-intervention wills.
16. Spurious wills.
17. Limitations upon admission to probate.
18. Collateral attack.
19. Power to vacate order or decree.
20. Costs of probate.
21. Appeal.
 - (1) In general.
 - (2) Parties.
 - (3) Review of findings.
 - (4) Reversal of judgment.

§ 957. Custodian of will to deliver same, to whom.

Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the superior court having jurisdiction of the estate, or to the executor named therein. A failure to comply with the provisions of this section makes the person failing responsible for all damages sustained by any one injured thereby.—*Kerr's Cyc. Code Civ. Proc.*, § 1298.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 736.
 Colorado—Mills's Statutes of 1912, sections 7876, 7877.
 Idaho*—Compiled Statutes of 1919, section 7440.
 Montana*—Revised Codes of 1907, section 7385.
 Nevada—Revised Laws of 1912, section 5858.
 New Mexico—Statutes of 1915, section 5871.
 North Dakota—Compiled Laws of 1913, section 8629.
 Oklahoma*—Revised Laws of 1910, section 6199.
 Oregon*—Lord's Oregon Laws, section 1138.
 South Dakota*—Compiled Laws of 1913, section 5659.
 Utah—Compiled Laws of 1907, section 3785.
 Washington—Laws of 1917, chapter 156, page 645, section 9.
 Wyoming*—Compiled Statutes of 1910, section 5409.

§ 958. Who may petition for probate of will.

Any executor, devisee, or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state, or a nuncupative will.—*Kerr's Cyc. Code Civ. Proc.*, § 1299.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 737.
 Hawaii—Revised Laws of 1915, section 2487.
 Idaho*—Compiled Statutes of 1919, section 7441.
 Montana*—Revised Codes of 1907, section 7386.
 Nevada—Revised Laws of 1912, section 5862.
 Oklahoma*—Revised Laws of 1910, section 6200.
 Oregon—Lord's Oregon Laws, section 1139.
 South Dakota*—Compiled Laws of 1913, section 5660.
 Utah—Compiled Laws of 1907, section 3786.
 Washington—Laws of 1917, chapter 156, page 645, section 9.
 Wyoming*—Compiled Statutes of 1910, section 5410.

§ 959. Contents of petition.

A petition for the probate of a will must show:

1. The jurisdictional facts;
2. Whether the person named as executor consents to act, or renounces his right to letters testamentary;

3. The names, ages, and residences of the heirs, legatees, and devisees of the decedent, so far as known to the petitioner;

4. The probable value and character of the property of the estate;

5. The name of the person for whom letters testamentary are prayed.

No defect of form or in the statement of jurisdictional facts actually existing, shall make void the probate of a will.—*Kerr's Cyc. Code Civ. Proc.*, § 1300.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 1613.

Arizona*—Revised Statutes of 1913, paragraph 733.

Hawaii—Revised Laws of 1915, section 2489.

Idaho*—Compiled Statutes of 1919, section 7442.

Montana—Revised Codes of 1907, section 7387.

North Dakota—Compiled Laws of 1913, sections 8635, 8639.

Oklahoma*—Revised Laws of 1910, section 6201.

Oregon—Lord's Oregon Laws, section 1157.

South Dakota*—Compiled Laws of 1913, section 5661.

Utah—Compiled Laws of 1907, section 3787.

Wyoming*—Compiled Statutes of 1910, section 5411.

§ 960. Form. Petition for probate of will.

[Title of court.]

[Title of estate.]

{ Department No. —.
[Title of form.]

To the Honorable the — Court of the County ¹ of —,
State of —:

The petition of —, of the county ² of —, state of —,
respectfully shows:

That — died on or about the — day of —, 19—,
at —;³

That said deceased, at the time of his death, was a resident of the county ⁴ of —, state of —, and left property in the county ⁵ of —, state of —;

That the character of the said property and probable revenue therefrom are as follows, to wit: —;⁶

That the estate and effects in respect to which the pro-

bate of the will is herein applied for does not exceed in value the sum of — dollars (\$—);

That said deceased left a will bearing date the — day of —, 19—, which your petitioner believes is, and therefore alleges to be, the last will of said deceased, and which is herewith presented to said — court;

That petitioner is named in said will as executor thereof, and consents ⁸ to act as such executor;

That the names, ages, and residences of the devisees and legatees under said will, so far as known to your petitioner, are as follows, to wit:

Names.	Approximate ages.	Residences.
—	—	—
—	—	—

That the subscribing witnesses to the said will are —, residing in the county ⁹ of —, state of —, and —, residing in the county ¹⁰ of —, in said state;

That the next of kin of said testator, whom your petitioner is advised and believes, and therefore alleges to be the heirs at law of said testator, and the names, ages, and residences of said heirs, so far as known to your petitioner, are as follows, to wit:

Names.	Approximate ages.	Residences. ¹¹
—	—	—
—	—	—

That at the time said will was executed, to wit, on the said — day of —, 19—, the said testator was over the age of eighteen (18) years, to wit, of the age of — (—) years, or thereabouts, and was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, and was in every respect competent, by last will, to dispose of all his estate;

That said will is in writing, signed by the said testator and duly attested by said subscribing witnesses.

Wherefore your petitioner prays that the said will may be admitted to probate; that letters testamentary be

issued to your petitioner; that, for that purpose, a time be appointed for proving said will; that all persons interested be notified to appear at the time appointed for proving the same; and that all other necessary and proper orders may be made in the premises.

Dated —, 19—. —, Petitioner.

—, Attorney for Petitioner.

Explanatory notes.—1 Or, City and County. 2 Or, city and county. 3 State place. 4, 5 Or, city and county. 6 Give particulars. 7 Title of court. 8 Or, renounces his right. 9, 10 Or, city and county. 11 Give addresses to which notices should be mailed. Contents of petition. See § 959, ante.

§ 961. Form. Petition by corporation for probate of will.

[Title of court.]

[Title of estate.]

{ Department No. —.
[Title of form.]

The petition of the — Company respectfully shows:

That petitioner is a corporation organized and existing under the laws of the state of —, and is authorized by its articles of incorporation to act as executor, administrator, guardian, assignee, receiver, depository, or trustee, and has a paid-up capital of not less than — thousand dollars (\$—), of which — thousand dollars (\$—), has been actually paid in, in cash, and has deposited with the treasurer of said state, for the benefit of its creditors, the further sum of — thousand dollars (\$—), in bonds and securities, in compliance with the provisions of —,¹ which said bonds and securities are now held by said treasurer in his official capacity for the uses and purposes aforesaid, and that petitioner has complied with all the requirements of said act and has procured, from the board of bank commissioners of the state of —, a certificate of authority stating that it has complied with the requirements of said act and is author-

ized to act as executor, administrator, guardian, assignee, receiver, depository, or trustee.²

Explanatory notes.—1 Designate the act giving such authority. 2 Proceed as in ordinary petition for probate of will.

§ 962. Form. Renunciation, by person named in will, of right to letters testamentary.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

Now comes —, named as executor² in the last will of —, deceased, and, renouncing his right to letters testamentary under such will, respectfully declines to act as the executor of said last will. —

Dated —, 19—.

Explanatory notes.—1 Give file number. 2 Or, as one of the persons named in the last will, etc., where two or more are named.

§ 963. Executor forfeits right to letters, when.

If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator, and that he is named as executor, fails to petition the proper court for the probate of the will, and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for delay is shown.—*Kerr's Cyc. Code Civ. Proc.*, § 1301.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 739.

Colorado—Mills's Statutes of 1912, section 7901; as amended by Laws of 1915, chapter 173, page 489.

Idaho*—Compiled Statutes of 1919, section 7443.

Kansas—General Statutes of 1915, section 4491.

Montana*—Revised Codes of 1907, section 7388.

South Dakota*—Compiled Laws of 1913, section 5662.

Utah*—Compiled Laws of 1907, section 3788.

Washington—Laws of 1917, chapter 156, page 645, section 9 (penalty).

Wyoming*—Compiled Statutes of 1910, section 5412.

§ 964. Form. Forfeiture of executor's right to letters.

[Title of court.]

[Title of estate.]

{	No. —.1	Dept. No. —.
	[Title of form.]	

It appearing that the said — died testate on or about the — day of —, 19—; that this court has jurisdiction of his estate; and that —, named by said decedent in his last will, as executor thereof, had knowledge of such death, and that he was named in said will as executor thereof, but has, for thirty (30) days after such knowledge, failed, without good cause shown, to petition this court for the probate of the will, and that letters testamentary be issued to him,—

It is adjudged and decreed, That the said — has renounced his right to letters testamentary in said estate.
—, Judge of the — Court.

Explanatory note.—1 Give file number.

§ 965. Production of will in possession of third person.

If it is alleged in any petition that any will is in the possession of a third person, and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time named in the order. If he has possession of the will and neglects or refuses to produce it in obedience to the order, he may by warrant from the court be committed to the jail of the county, and be kept in close confinement until he produces it.—*Kerr's Cyc. Code Civ. Proc.*, § 1302.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 740.

Colorado—Mills's Statutes of 1912, section 7878.

Idaho*—Compiled Statutes of 1919, section 7444.

Kansas—General Statutes of 1915, sections 11762, 11765.

Montana*—Revised Codes of 1907, section 7389.

Nevada—Revised Laws of 1912, section 5864.

New Mexico—Statutes of 1915, section 5871.

North Dakota—Compiled Laws of 1913, section 8630.

Oklahoma*—Revised Laws of 1910, section 6202.

Oregon—Lord's Oregon Laws, section 1140.

South Dakota*—Compiled Laws of 1913, section 5663.

Utah—Compiled Laws of 1907, section 3785.

Washington—Laws of 1917, chapter 156, page 645, section 9.

Wyoming—Compiled Statutes of 1910, section 5413.

§ 966. Form. Petition for production and probate of will in possession of third person.

[Title of court.]

[Title of estate.]

{ Department No. —.
[Title of form.]

To the Honorable the — Court of the County ¹ of —, State of —:

The petition of —, of the county ² of —, state of —, respectfully shows:

That — died on or about the — day of —, 19—, at —;

That said deceased at the time of his death was a resident of the county ³ of —, state of —, and left property in the county ⁴ of —, state of —;

That the character of the said property ⁵ and probable revenue therefrom are as follows, to wit: —;⁶

That the value of the estate and effects in respect to which the probate of the will is herein applied for does not exceed the sum of — dollars (\$—);

That said deceased left a will bearing date the — day of —, 19—, which is in the possession of a third person, to wit, one —, and has never been presented for probate;

That your petitioner is the widow ⁷ of deceased, and is interested in the estate of said decedent;

That — is the person named as executor in said will, and consents to act as such;⁸

That the names, ages, and residences of the heirs of said decedent, so far as known to your petitioner, are as follows, to wit, —

Names.	Ages.	Residences.
—, widow of decedent,	— years,	—;
—, son of decedent,	— years,	—;

and that the names, ages, and residences of his devisees and legatees are as follows, to wit:—

Names.	Ages.	Residences.
—, devisee,	— years,	—;
—, devisee,	— years,	—;

Wherefore your petitioner prays that a day of court may be appointed for the hearing of this petition; that legal notice thereof be given; that an order issue forthwith to the said —, requiring him to produce said will at such hearing; and that upon said hearing, such will, if produced in court, be admitted to probate, and letters testamentary thereon be issued to —, the person named in said will as executor. —, Petitioner.

—, Attorney for Petitioner.

Explanatory notes.—1 Or, City and County. 2-4 Or, city and county. 5 Give description of property, and state whether it is the separate property of decedent, or the community property of decedent and his widow, naming her. 6 State facts as to probable revenue. 7 Or, whatever other interest petitioner may have. 8 Or, that he renounces his right to letters testamentary. If the name of the executor is unknown, allege such fact, and that petitioner can not, therefore, state whether such person consents to act as executor, or renounces his right to letters testamentary.

§ 967. Form. Order requiring third person having possession of a will to produce it.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

It being alleged in the petition of —, widow of —, deceased, now on file in this court, that the will of said —, now deceased, is in the possession of a third person, viz., one —, and the court being satisfied that such allegation is correct,²—

It is ordered, That the said — produce the said will on or before the — day of —, 19—, at — o'clock

in the forenoon³ of said day, and file the same in this court; and that a copy of this order be served upon said — at least —⁴ days before said time.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—1 Give file number. 2 To satisfy the court, an affidavit should be filed with the petition, or a witness be examined. 3 Or, afternoon. 4 As directed by the judge.

§ 968. Form. Warrant of commitment for failure to produce will.

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.
[Title of form.]

A petition having been filed herein on the — day of —, 19—, by the widow of —, deceased, in which it was alleged that —, a third person, had in his possession the will of said deceased, this court, being satisfied² that such allegation was true, thereupon made and entered the following order, to wit, —,³ which was served as therein directed, —

And it appearing that the said — has failed to obey said order, and still refuses to obey it, and it being shown⁴ that said will is still in the possession of said —, he is therefore adjudged guilty of contempt of court for such failure and refusal; and

It is ordered, That said — be committed to the county jail of the county⁵ of —, state of —, there to be kept in close confinement until he produces said will in obedience to the order of this court.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—1 Give file number. 2 From affidavit filed with the petition, showing fact that the will was in the possession of such third person. 3 Insert copy of the order. 4 Make showing by examination of witness. 5 Or, city and county.

§ 969. Notice of petition for probate, how given.

When the petition is filed, and the will produced, the clerk of the court must set the petition for hearing by

the court upon some day not less than ten nor more than thirty days from the production of the will. Notice of the hearing shall be given by such clerk by publishing the same in a newspaper of the county; if there is none, then by three written or printed notices, posted at three of the most public places in the county.

PUBLICATION AND POSTING.—If the notice is published in a weekly newspaper, it must appear therein on at least three different days of publication; and if in a newspaper published oftener than once a week, it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and the last day being included. If the notice is by posting, it must be given at least ten days before the hearing.—*Kerr's Cyc. Code Civ. Proc.*, § 1303.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 969.

Colorado—Mills's Statutes of 1912, sections 7880, 7881.

Idaho—Compiled Statutes of 1919, section 7445.

Montana*—Revised Codes of 1907, section 7390.

Nevada—Revised Laws of 1912, section 5866.

New Mexico—Statutes of 1915, sections 5873, 5874.

North Dakota—Compiled Laws of 1913, section 8637.

Oklahoma—Revised Laws of 1910, section 6203.

South Dakota—Compiled Laws of 1913, section 5664.

Utah—Compiled Laws of 1907, section 3789.

Wyoming—Compiled Statutes of 1910, section 5414.

§ 970. Form. Time fixed by clerk for hearing probate of will and petition for letters testamentary.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

An instrument in writing which purports to be the last will of —, deceased, having on this day come into the possession of said —² court, and a petition for the probate thereof, and for the issuance of letters testamentary to —, having been filed by —, —

Now I, —, clerk of said —³ court, hereby fix and

appoint —, ⁴ the — day of —, 19—, at — o'clock in the forenoon ⁵ of said day, and the court-room of said court, at the court-house ⁶ in the said county ⁷ of —, state of —, as the time and place for proving said will and for hearing said petition.

Dated —, 19—. —, Clerk of said Court.

By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2, ³ Title of court. 4 Day of week. ⁵ Or, afternoon. ⁶ State location of court-house. 7 Or, city and county.

§ 971. Form. Affidavit of posting notice of time set for hearing probate of will.

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

State of —, }
County ² of —, } ss.

—, deputy county clerk of said county, being duly sworn, says:

That on the — day of —, 19—, he posted correct and true copies of the within notice in three of the most public places in said county, to wit: one of the said copies at the place at which the court is held, one at —, ³ and one at —, ⁴ in said county.

Subscribed and sworn to before me this — day of —, 19—. —, County Clerk.

Explanatory notes.—1 Give file number. 2 Or, City and County. ³ The United States post-office in —. ⁴ The city hall in —. This affidavit is to be attached to a copy of the notice.

§ 972. Form. Affidavit of publication of notice of time and place appointed for probate of will.

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

State of —, }
County ² of —, } ss.

—, of the said county and state, having been first duly sworn, deposes and says:

That he is, and at all times embraced in the publication herein mentioned was, the principal clerk ³ of the printers and publishers of the —, a newspaper of general circulation,⁴ printed and published daily (Sundays excepted) in said county;⁵

That deponent, as such clerk, during all times mentioned in this affidavit has had, and still has, charge of all the advertisements in said newspaper; and

That a notice of the time and place appointed for the probate of a will, of which the annexed is a true printed copy, was published in the above-named newspaper on the following dates, to wit, —;⁶ being as often as said newspaper was published during said period; and further deponent saith not.

Subscribed and sworn to before me this — day of —, 19.—

—, Notary Public in and for the County⁷ of —, State of —.

Explanatory notes.—1 Give file number. 2 Or, City and County. 3 Or, the printer; or, the foreman of the printer, etc. 4 Section 1303 of the Code of Civil Procedure of California does not strictly require publication in a newspaper "of general circulation" published in the county; and, if the publication is made in a newspaper published in the county, it is a sufficient compliance with the statute. Estate of Melone, 141 Cal. 331, 334, 74 Pac. 991. 5 Or, city and county. 6 Put in each date. This affidavit should be annexed to a copy of the notice. 7 Or, city and county.

§ 973. Notification of time for probate of will.

Copies of the notice of the time appointed for the probate of the will must be addressed to the heirs of the testator and the devisees and legatees named in the will resident in the state, at their places of residence, if known to the petitioner, and deposited in the post-office, with the postage thereon prepaid; at least ten days before the hearing. If their places of residence be not known, the copies of notice may be addressed to them, and deposited in the post-office at the county seat of the county where

the proceedings are pending. A copy of the same notice must in like manner be mailed to the person named as executor, if he be not the petitioner; also, to any person named as co-executor not petitioning, if their places of residence be known. Proof of mailing the copies of the notice must be made at the hearing. Personal service of copies of the notice at least ten days before the day of hearing is equivalent to mailing—*Kerr's Cyc. Code Civ. Proc.*, § 1304.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 742.

Colorado—Mills's Statutes of 1912, section 7880; as amended by Laws of 1915, chapter 173, page 496; see, also, section 7881.

Idaho*—Compiled Statutes of 1919, section 7446.

Montana*—Revised Codes of 1907, section 7391.

New Mexico—Statutes of 1915, sections 5874, 5875.

North Dakota—Compiled Laws of 1913, section 8636.

Oklahoma—Revised Laws of 1910, section 6204.

South Dakota—Compiled Laws of 1913, section 5665.

Wyoming*—Compiled Statutes of 1910, section 5415.

§ 974. Form. Affidavit of mailing notice to heirs.

[Title of court.]

[Title of estate.]

{ No. —. Dept. No. —.
[Title of form.]

State of —, }
County ¹ of —, } ss.

—, being duly sworn, deposes and says:

That he is a male citizen of the United States, over the age of twenty-one years, competent to be a witness in the matter of the above-entitled estate; that on the — day of —, 19—, he addressed to each of the parties herein named, at their respective places of residence, to wit, —

To —,	residing at —;
To —,	residing at —;
To —,	residing at —;

and deposited the same in sealed envelopes in the United States post-office, at —,² state of —, postage pre-

paid, a copy of the notice of the time and place appointed for hearing the petition for the probate of the will of said deceased, a copy of which notice is hereto annexed, being at least ten (10) days before the time appointed for said hearing.

Subscribed and sworn to before me this — day of —, 19—. —, Deputy County Clerk.

Explanatory notes.—1 Or, City and County. 2 State place and county.

§ 975. Form. Proof of personal service of notice.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

—, being duly sworn, says:

That he is over twenty-one years of age, not interested in the above-entitled estate and is competent to be a witness in the matter of said estate; that on the — day of —, 19—, he served notice of the time appointed for the probate of the will of the above-named decedent upon —, —, and —, the persons named in said notice, by delivering to each of them, personally, in the said county ² of —, state of —, a copy of said notice, the original of which is hereto annexed.

Subscribed and sworn to before me this — day of —, 19—.

—, County Clerk of said County ³ of —.⁴

Explanatory notes.—1 Give file number. 2, 3 Or, city and county.
⁴ Or other officer authorized to take the oath.

§ 976. Order to enforce production of wills or attendance of witnesses.

A judge of the superior court may at any time make and issue all necessary orders and writs to enforce the production of wills and the attendance of witnesses.—*Kerr's Cyc. Code Civ. Proc.*, § 1305.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 743.

Colorado—Mills's Statutes of 1912, section 7885.

Idaho—Compiled Statutes of 1919, section 7447.
 Montana—Revised Codes of 1907, section 7392.
 Nevada—Revised Laws of 1912, section 5867.
 Oklahoma—Revised Laws of 1910, section 6205.
 South Dakota—Compiled Laws of 1913, section 5666.
 Washington—Laws of 1917, chapter 156, page 646, section 10.
 Wyoming—Compiled Statutes of 1910, section 5416.

§ 977. Hearing proof of will after proof of service of notice.

At the time appointed for the hearing, or the time to which the hearing may have been postponed, the court, unless the parties appear, must require proof that the notice has been given, which being made, the court must hear testimony in proof of the will.—*Kerr's Cyc. Code Civ. Proc.*, § 1306.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 744.
 Colorado—Mills's Statutes of 1912, section 7884.
 Idaho—Compiled Statutes of 1919, section 7448.
 Montana*—Revised Codes of 1907, section 7393.
 Nevada—Revised Laws of 1912, section 5871.
 New Mexico—Statutes of 1915, section 5878.
 Oklahoma—Revised Laws of 1910, section 6206.
 South Dakota—Compiled Laws of 1913, section 5667.
 Washington—Laws of 1917, chapter 156, pages 645, 646, sections 10 and 12.
 Wyoming—Compiled Statutes of 1910, section 5417.

§ 978. Form. Consent of attorney of minors, etc., to probate of will.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
 [Title of form.]

I, —, appointed by said —² court, attorney of the minors, — and —, who are interested in the said estate, to represent them on the hearing of the testimony in proof of a certain instrument in writing filed in said court on the — day of —, 19—, purporting to be the last will of said deceased, do hereby appear on behalf of said minors and consent that the said written instru-

ment, purporting to be the last will of said deceased, as aforesaid, be allowed and recorded herein, and be admitted to probate in said court, as the last will of said deceased, and that letters testamentary be issued to — according to the prayer of the petition filed herein on the — day of —, 19—.

—, Attorney for said minors, —³ and —.⁴

Dated —, 19—.

Explanatory notes.—¹ Give file number. ² Give title of court.
³, ⁴ Giving their names.

§ 979. Form. Testimony of subscribing witnesses on probate of will.

[Title of court.]

[Title of estate.]

{ Department No. —.
[Title of form.]

State of —, }
County ¹ of —, } ss.

—, of lawful age, and a competent witness, being duly sworn in open court, testifies as follows:

I reside in the county ² of —, state of —.

I knew — on the — day of —, 19—, the date of the instrument now shown to me, which is marked as filed in this court on the — day of —, 19—, and which purports to be the last will of the said —, now deceased.

I am one of the subscribing witnesses to said instrument. I also knew, at the date of said instrument, —, the other subscribing witness.

The said instrument was signed and sealed by the said —, now deceased, at —, in the county ³ of —, state of —, on the said — day of —, 19—, the day it bears date, in the presence of myself and of said —; and the said —, now deceased, thereupon published the said instrument as, and, to us, declared the same to be, his last will, and requested us in attestation thereof to sign the same as witnesses. The said — and I, then

and there, in the presence of the said —, now deceased, and in the presence of each other, subscribed our names as witnesses to the said instrument.

At the time of executing the said instrument, to wit, the — day of —, 19—, the said —, now deceased, was over the age of eighteen (18) years, to wit, of the age of — () years or thereabouts, and was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence. —

Subscribed and sworn to in open court before me this — day of —, 19—. —, Deputy County Clerk. 2

Explanatory notes.—1 Or, City and County. 2, 3 Or, city and county.

§ 980. Form. Testimony of applicant on probate of will.

[Title of court.]

[Title of estate.]

{ No. —. Dept. No. —.
[Title of form.]

State of —, }
County ¹ of —, } ss.

—, being duly sworn in open court, testifies as follows:

I am —, the person named as executor in the written instrument now shown to me, marked as filed in this court on the — day of —, 19—, and which purports to be the last will and testament of —, deceased.

I reside in the county ² of —, state of —, and am of the age of twenty-one years and upwards.

I knew said —; he is dead; he died on or about the — day of —, 19—, at —,³ in the said county ⁴ of —, state of —.

At the time of his death, he was a resident of the county ⁵ of —, and left estate in the said county ⁶ of —, state of —, the value and character of which property is, to the best of my knowledge, information, and belief, correctly set forth in the petition for the probate of said will.

The real estate is of the value of — dollars (\$—),

or thereabouts, and the annual rents, issues, and profits of said real estate amount to the sum of — dollars (\$—), or thereabouts.

The personal property is of the value of — dollars (\$—), or thereabouts.

The said estate and effects, in respect to which the probate of said will has been applied for, do not exceed the value of — dollars (\$—).

All of the estate of said deceased is community property, the same having been acquired since marriage.

The said written instrument came into my possession as follows, to wit, —;⁷ and I believe the same to be the last will of —, deceased, as due search and inquiry among his effects and elsewhere have been made, but no other written instrument executed by him and purporting to be a will has been found.

The next of kin of said deceased are —.⁸

On the — day of —, 19—, when said will was executed, said deceased was over the age of eighteen (18) years, being of the age of — () years or thereabouts, and was of sound and disposing mind.

Subscribed and sworn to in open court before me this — day of —, 19—. —, Deputy County Clerk.

Explanatory notes.—1 Or, City and County. 2 Or, city and county. 3 State place. 4-6 Or, city and county. 7 State how. Or, the said instrument in writing was handed to me by, etc., stating the facts. 8 Give names, ages, residences, etc.

§ 981. Who may appear and contest the will.

Any person interested may appear and contest the will. Devisees, legatees, or heirs of an estate may contest the will through their guardians, or attorneys appointed by themselves or by the court for that purpose; but a contest made by an attorney appointed by the court does not bar a contest after probate by the party so represented, if commenced within the time provided in article four of this chapter; nor does the non-appointment

of an attorney by the court of itself invalidate the probate of a will.—*Kerr's Cyc. Code Civ. Proc.*, § 1307.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 745.

Idaho*—Compiled Statutes of 1919, section 7449.

Kansas—General Statutes of 1915, section 11774; as amended by Laws of 1917, chapter 336, page 493 (limitation of action to contest probate).

Montana*—Revised Codes of 1907, section 7394.

Nevada—Revised Laws of 1912, section 5872.

Oklahoma*—Revised Laws of 1910, section 6207.

South Dakota*—Compiled Laws of 1913, section 5668.

Wyoming—Compiled Statutes of 1910, section 5439.

§ 982. Admitting will to probate.

If no person appears to contest the probate of a will, the court may admit it to probate on the testimony of one of the subscribing witnesses only, if he testifies that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution.

If it appears at the time fixed for the hearing that none of the subscribing witnesses reside in the county, but that the deposition of one of them can be taken elsewhere, the court may direct it to be taken, and may authorize a photographic copy of the will to be made and to be presented to such witness on his examination, who may be asked the same questions with respect to it and the handwriting of himself, the testator, and the other witness, as would be pertinent and competent if the original will were present.

If neither the attendance in court nor the deposition of any of the subscribing witnesses can be procured, the court may admit the will to probate upon the testimony of any other witness as provided in section thirteen hundred and seventeen.—*Kerr's Cyc. Code Civ. Proc.*, § 1308.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona—Revised Statutes of 1913, paragraph 746.

Colorado—Mills's Statutes of 1912, sections 7886, 7889.

Idaho—Compiled Statutes of 1919, section 7450.

Kansas—General Statutes of 1915, sections 11763, 11764, 11765, 11767, 11769.

Montana—Revised Codes of 1907, section 7395.

Nevada—Revised Laws of 1912, section 5873.

New Mexico—Statutes of 1915, sections 5878, 5879.

North Dakota—Compiled Laws of 1913, section 8640.

Oklahoma—Revised Laws of 1910, section 6208.

South Dakota—Compiled Laws of 1913, section 5669; as amended by Laws of 1916-17, chapter 185, page 243.

Utah—Compiled Laws of 1907, section 3792.

Washington—Laws of 1917, chapter 156, page 645, section 10.

Wyoming—Compiled Statutes of 1910, section 5418.

§ 982a. Probate of will detained outside state.

If it is alleged in any petition that any will of any person who at the time of his death was a resident of this state is detained beyond the jurisdiction of the state, in a court of any other state or foreign country, and that such will can not be produced for probate in this state, and the court is satisfied that the allegations are true, a copy of the will duly authenticated may be proved, allowed, and admitted to probate in this state in lieu of the original will, and have the same force and effect as the original will. The same proof shall be required in order to admit the will to probate in this state as would be required under the provisions of this title if the original will were produced.

PHOTOGRAPHIC COPY.—The court may authorize a photographic copy of the will to be presented to the subscribing witness upon his examination in court, or by deposition as provided in section thirteen hundred and eight, and such witness may be asked the same questions with respect to it and the handwriting of himself, the testator, and the other witness, as would be pertinent and competent if the original will were present.—*Kerr's Cyc. Code Civ. Proc.*, § 1310.

§ 983. Holographic wills.

A holographic will may be proved in the same manner that other private writings are proved.—*Kerr's Cyc. Code Civ. Proc.*, § 1309.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska—Laws of 1915, chapter 4, page 4.
- Arizona*—Revised Statutes of 1913, paragraph 747.
- Idaho*—Compiled Statutes of 1919, section 7451.
- Montana*—Revised Codes of 1907, section 7396.
- Oklahoma*—Revised Laws of 1910, section 6209.
- South Dakota*—Compiled Laws of 1913, section 5670.
- Utah—Compiled Laws of 1907, section 2736.
- Washington—Laws of 1917, chapter 156, page 645, section 10.
- Wyoming*—Compiled Statutes of 1910, section 5419.

§ 984. Form. Certificate of proof of holographic will, and facts found.

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.
[Title of form.]

State of —, }
County ² of —, } ss.

I, —, Judge of said —³ Court, hereby certify:

That on the — day of —, 19—, the annexed instrument was admitted to probate, as the last will of —, deceased, and from the proofs taken and the examination had therein, the said court finds as follows:

That said — died on or about the — day of —, 19—, in the county ⁴ of —, state of —; that at the time of his death he was a resident of the county ⁵ of —, state of —; that the said annexed will was wholly written, dated, and signed in the county ⁶ of —, state of —, by the said testator, in his own handwriting and by his own hand, and that the same was duly executed by the said testator on or about the — day of —, 19—, at which time it bears date; and that the said decedent, at the time of executing said will, was of the age of eighteen years and upwards, was of sound and disposing

mind, and not under duress, menace, fraud, or undue influence, nor in any respect incompetent to devise and bequeath his estate.

In witness whereof, I have signed this certificate and caused the same to be attested by the clerk of said court, under the seal thereof, this — day of —, 19—.

—, Judge.

[Seal] Attest: —, Clerk of the —⁷ Court.

By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2 Or, City and County. 3 Title of court. 4-6 Or, city and county. 7 Title of court.

PROBATE OF WILLS.

- | | |
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| 1. Nature of proceeding. | 9. Order or decree admitting will to probate. |
| 2. Custodian of will. Duty and liability of. | (1) In general. |
| 3. Jurisdiction of courts. | (2) Void statute. |
| (1) In general. | (3) Effect of decree. |
| (2) Prerequisites to jurisdiction. | (4) Establishes the will <i>prima facie</i> . |
| (3) As to non-residents. | (5) Conclusiveness of decree. |
| (4) Issues properly triable. | (6) Decree annulling the will. |
| (5) Issues not triable. | (7) Gives right to letters testamentary. |
| (6) Destruction of will as affecting. | 10. Probate of after-discovered will. |
| (7) Involves power to postpone hearing. | 11. What wills can not be admitted to probate. |
| 4. Parties. | 12. Admission to probate under special act. |
| (1) Who may apply for probate. | 13. Probate of holographic will. |
| (2) Who can not oppose probate. | (1) In general. |
| 5. Notice of application for probate. | (2) Instrument entitled to such proof. |
| 6. Pleadings. | (3) Instruments not entitled to such proof. |
| (1) Petition for probate. | 14. Nuncupative wills. |
| (2) Issues. | 15. Non-intervention wills. |
| 7. Burden of proof. | 16. Spurious wills. |
| (1) In general. | 17. Limitations upon admission to probate. |
| (2) Presumption of sanity. | 18. Collateral attack. |
| 8. Evidence. | 19. Power to vacate order or decree. |
| (1) Testimony of subscribing witnesses. | 20. Costs of probate. |
| (2) As to mental capacity and undue influence. | 21. Appeal. |
| (3) As to identity of persons misnamed. | (1) In general. |
| (4) Wills executed by blind persons. | (2) Parties. |
| (5) Presumptions as to the will. | (3) Review of findings. |
| (6) Alteration of will. Effect of. | (4) Reversal of judgment. |
| (7) Will on different sheets of paper. | |
| (8) Practice and procedure. | |

1. *Nature of proceeding.*—The probate of a will and the administration of the estates of deceased persons, are proceedings in rem, binding upon all the world. Superior courts, while acting as probate courts, have all equity powers necessary to the completing of administration of estates, and, under our system, it is not necessary to invoke the powers of a court of chancery for any purpose within the administration.—*Estate of Maxwell*, 74 Cal. 384, 16 Pac. 206, 207. Such proceedings being in rem, personal notice is not required to confer jurisdiction; constructive notice is sufficient, and the provisions of the statute providing therefor are not opposed to the requirements of the fourteenth amendment of the federal constitution.—*Estate of Davis*, 136 Cal. 590, 596, 69 Pac. 412, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183. A hearing for the admission of a will to probate is in the nature of an action, and the order thereon is in the nature of a judgment. The heirs at law have the right to be heard. They have the right to be present at the hearing; and if they are not notified thereof, and an order is made, without giving them an opportunity to be heard, or to contest the admission of the will to probate, they stand in very much the same position as if a judgment had been rendered against them without bringing them into court. An order entered, under such circumstances, is absolutely void, and the lapse of time can not render it valid.—*In re Estate of Charlebois*, 6 Mont. 373, 12 Pac. 775, 777. A proceeding on a petition for the probate of a will is distinct from a proceeding contesting the will. The hearing of the necessary statutory evidence on the petition for probate must be heard by the court at some time, and this can properly be done as well before as after the hearing of the contest.—*Estate of McDermott*, 148 Cal. 43, 82 Pac. 842, 844. Under the Oregon statute, the probate of a will is wholly an ex parte proceeding. After the will is admitted to probate, if any one interested wants to contest the will, he must file his complaint or allegations of contest, and thereupon the burden of proving the will is imposed on the proponent.—*Malone v. Cornelius*, 34 Or. 192, 55 Pac. 536, 537. The mere nomination of an executor, without making any disposition of one's estate, or giving any other direction whatever, will constitute a will, and render it necessary that the instrument be established in the probate court.—*Estate of Hickman*, 101 Cal. 609, 613, 36 Pac. 118. Probate proceedings in the settlement of estates are in the nature of proceedings in rem and upon the statutory notices being given all the world is charged with notice.—*Connolly v. Probate Court*, 25 Ida. 35, 136 Pac. 208. Probate proceedings are as a general rule regarded by all courts as proceedings in rem, yet some of the courts when they come to apply the doctrine of notice, seem to disregard the rule applicable to proceedings in rem and apply the rule applicable to proceedings in personam, and if these distinctions are not kept in mind when the cases are examined confusion may result and it may be concluded that the conflict among the courts with respect to probate proceedings is much greater than it really is.—

Barrette v. Whitney, 36 Utah 574, 37 L. R. A. (N. S.) 368, 106 Pac. 522, 524. A will is admitted to probate at the time the court performs the judicial act of admitting it, and not on a subsequent date, when the order is filed in the clerk's office.—*State v. Superior Court*, 76 Wash. 27, 32, 135 Pac. 494. One who accepts a benefit under a will must accept the whole will, and ratify every portion of it.—*In re Parkes' Estate*, *Parkes v. Burkhart*, 101 Wash. 659, 172 Pac. 908. A person can not offer a will as a valid testamentary disposition of a decedent's estate so far as it passes property to himself, but regard it as of no effect, and virtually set it aside as to its other features.—*In re Parkes' Estate*, *Parkes v. Burkhart*, 101 Wash. 659, 172 Pac. 908. The probate of wills and the administration of estates of deceased persons are in the nature of proceedings in rem, as to which jurisdiction may be obtained by publication of notice; even defects in the statement of jurisdictional facts actually existing shall not affect the validity of an order admitting a will to probate.—*Nicholson v. Leatham*, 28 Cal. App. 597, 601, 153 Pac. 965, 155 Pac. 98. The probate of a will is a proceeding in rem, binding on all persons interested in the will, who might, on being constructively notified to appear at the probate, have come in, and, had they done so, would have been heard for or against.—*Estate of Allen*, 176 Cal. 632, 169 Pac. 364. The defining, in the statute of limitations, of "action" as including for its purposes any proceeding of a civil nature, and the statute's declaring that "an action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued," have no application to a proceeding for the probate of a will.—*In re Hume's Estate*, *Reeves v. Hume* (Cal.), 176 Pac. 681.

REFERENCES.

Probate of wills.—See notes 2 L. R. A. 795, 10 L. R. A. 95. What may be admitted to probate as a will.—See note 10 L. R. A. 95. Validity of will making no disposition of property.—See note 1 Am. & Eng. Ann. Cas. 368. Bill for construction of will and for directions to trustees.—See note 5 L. R. A. 104-109. Probate, admission of will to, without first obtaining, by direct proceedings, annulment of letters already granted.—See note 9 Am. & Eng. Ann. Cas. 962. Effect of delay in probating will.—See note 57 L. R. A. 253-266. Joint and mutual wills, validity and probate of.—See notes 2 Am. & Eng. Ann. Cas. 26, 38 L. R. A. 289-293. Consult notes to the following sections of *Kerr's Cal. Cyc. Code Civ. Proc.*, as to the subjects indicated: Petition and notice for probate, §§ 1299-1304; proof of nuncupative will, §§ 1290, 1291; hearing of petition for probate before a jury, when jury is demanded, verdict, judgment, etc., §§ 1313, 1314; hearing proof of will, § 1306. Right to dismiss or withdraw proceedings to probate or contest a will.—See note 19 L. R. A. (N. S.) 121-124. Time and place to determine question of forfeiture to take under will, because of violation of contest clause.—See subdivision 9 of note following § 750, ante.

2. Custodian of will. Duty and liability of.—Under the provisions of sections 7080, Rev. Stats. 1908, of Colorado, a person who has in his possession or that there is good reason to believe has in his possession the last will of any deceased person and secretes or willfully withholds the same is liable to attachment by the court having jurisdiction to receive the probate of such will and upon arrest may be examined thereon and if found guilty may be punished as for contempt of court by a fine not exceeding \$500, or by imprisonment until he produces the will or accounts therefor to the satisfaction of the court.—*Walch v. Orrell*, 53 Colo. 361, 127 Pac. 141. The mere proposing for probate of a later and inconsistent will, by its custodian, who was both a beneficiary thereunder and the executor named therein, was not a violation of a provision against contest contained in an earlier will, inasmuch as it was the duty of such custodian, under section 1298 Cal. C. C. P., to file the will and her statutory right under sections 1299 and 1301 of that code, to ask that the will be proved and probated.—*In re Bergland's Estate*, 177 Cal. 227, 170 Pac. 400, 401. The federal laws relating to national banks contain nothing whereby such banks can be the lawful depositories of wills and be made liable as such.—*Myers v. Exchange Nat. Bank*, 96 Wash. 244, 253, L. R. A. 1918A, 67, 164 Pac. 951. A will, intrusted to a bank for safe keeping, can not be regarded as a "special deposit."—*Myers v. Exchange Nat. Bank*, 96 Wash. 244, L. R. A. 1918A, 67, 164 Pac. 951. No liability either in contract or in tort attaches to a national bank that undertakes the safe keeping of a last will and testament.—*Myers v. Exchange Nat. Bank*, 96 Wash. 244, L. R. A. 1918A, 67, 164 Pac. 951. A complaint charging a defendant with secreting or willfully withholding a will is fatally defective if it does not allege that the will was such a one that the county court in which the proceedings were brought had jurisdiction to receive the probate of.—*Coulter v. People*, 53 Colo. 40, 123 Pac. 648. The custodian of the will of another is in duty bound to produce it on the testator's death.—*Estate of Bergland*, 177 Cal. 227, 170 Pac. 400. It is the right of the custodian of another's will to petition for its probate.—*Estate of Bergland*, 177 Cal. 227, 170 Pac. 400.

3. Jurisdiction of courts.

(1) **In general.**—The ordinary functions of a court of probate, acting in a proceeding for the probate of a will, are to determine two things only; viz., the testamentary capacity of the testator, acting without restraint, and the sufficiency of the formalities observed in the execution of the instrument.—*In re John's will*, 30 Or. 494, 36 L. R. A. 242, 47 Pac. 341, 343. Under the statutes, in some states, the probate court has jurisdiction to construe wills upon the application for probate.—*Siddall v. Harrison*, 73 Cal. 560, 562, 15 Pac. 130; *Estate of Hinckley*, 58 Cal. 457, 518; *In re John's Will*, 30 Or. 494, 36 L. R. A. 242, 47 Pac. 341, 344. It is questionable whether a court of equity has jurisdiction to construe a will, under the laws of the state of California—*Siddall*

v. Harrison, 73 Cal. 562, 15 Pac. 130. Such a court has no jurisdiction to probate a will, and, if it can not entertain direct jurisdiction to establish a will, it has no jurisdiction to do so as incident to jurisdiction over other matters.—McDaniel v. Pattison (Cal.), 27 Pac. 651, 654. Until the will has been admitted to probate, the court has no power to appropriate the funds of the estate to aid either the proponent or contestant.—Estate of McKinney, 112 Cal. 447, 44 Pac. 743, 744. The petition for probate of a will invests the court with jurisdiction of the estate and it appearing that the will offered by contestant is valid, he will not be permitted to withdraw same.—In re Tresidder, 70 Wash. 15, 125 Pac. 1037. In the probate of wills, the county court of Oregon is one of exclusive and superior jurisdiction.—Stevens v. Myers, 62 Or. 372, 408, 121 Pac. 434, 126 Pac. 29. The probate court may issue commissions to take depositions pending an appeal to the district court from an order refusing to remove an administrator and refusing to appoint in his stead an executor named in a will. Such appeal in no manner affects the jurisdiction of the probate court over further proceedings as to the probate of the will.—Butcher v. Butcher, 21 Colo. App. 416, 122 Pac. 399. The commissioner named in the commission to take depositions thereby becomes an officer of the court issuing the commission and no proof is required of his being a justice, or of his authority to administer oaths, or of his signature.—Butcher v. Butcher, 21 Colo. App. 416, 122 Pac. 399. The probate court has no right to require a guardian ad litem to agree not to contest the will if his wards are paid the legacies coming to them thereunder.—Robbins v. Hoover, 50 Colo. 610, 115 Pac. 530. Where a testator, at the time of his death, was a resident of the state of California, his will must be proved originally as a domestic will in the county of his residence, and, so far as that state is concerned, it can not be proved elsewhere and brought into that state for the purposes of secondary or ancillary administration.—Estate of Zollikofer, 167 Cal. 196, 138 Pac. 995. A document offered for probate in the state of California as a foreign will, under sections 1322 to 1324 of the Code of Civil Procedure, must be denied probate therein, if the testator, at the time of his death, was a resident of that state, and there was no evidence given at the hearing to show the execution of the will other than the decree of the foreign court admitting it to probate, and no offer made to prove the execution of the will as an original document.—Estate of Zollikofer, 167 Cal. 196, 138 Pac. 995. Such foreign probate affords no legal proof in that state of the existence of the will purporting to be probated, and does not show an interest in the estate of the decedent, on the part of a person whose only claim of interest was based upon a legacy under such purported will.—Estate of Zollikofer, 167 Cal. 196, 138 Pac. 995. There can be no escape from the requirement of the statute of Oregon, that the county court proceed as in equity rather than at law, by making a distinction between the mere proof of a will, in common form, and a proceeding to set

it aside; in either case the question is the same, namely, the proof of the will.—*Stevens v. Myers*, 62 Or. 372, 412, 121 Pac. 434, 126 Pac. 29. In the state of Washington probate matters are administered by the superior court as a court of general jurisdiction, both as to legal and equitable matters.—*In re Hoscheid's Estate*, 78 Wash. 309, 139 Pac. 61, 66. A court of probate in the state of Colorado has no power to admit a will of a husband or wife to probate as conveying the whole estate unless the written consent of the surviving wife or husband has been given, because in the absence of such written consent such will is by the very terms of the statute inoperative as to the survivor's share of the estate. Where the application for the probate of a will comes on to be heard and the consent in writing of the surviving wife or husband has not been given, the court has no jurisdiction to admit such will to probate as conveying the whole estate, but must admit it subject to the survivor's right of election. The written consent being a statutory requirement, it is its absence and not the cause or reason of its absence, which qualifies and restricts the jurisdiction of the court. The question is strictly a jurisdictional one.—*Hodgkins v. Ashby*, 56 Colo. 553, 139 Pac. 538, 541.

REFERENCES.

Equity declines jurisdiction over the probate of wills, and will refuse to cancel or set aside such probate on the ground of fraud or perjury.—See note 106 Am. St. Rep. 643. Jurisdiction of suit for construction of will.—See note 10 L. R. A. 766, 767. Probate of will, when void for want of jurisdiction.—See note 33 Am. Dec. 239-243. Power of courts of probate to revoke probate of wills, or to probate additional will or codicil.—See note 90 Am. Dec. 136-138. Probate court, jurisdiction of, to construe wills.—See note 5 Am. & Eng. Ann. Cas. 473. Jurisdiction of probate court over estates.—See notes *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 1294, 1295. Jurisdiction to admit to probate will not probated at testator's domicile.—See note 33 L. R. A. (N. S.) 658.

(2) *Prerequisites to jurisdiction.*—A will is not sufficiently probated or proved to make it effectual to pass title to property unless it is before the court; the first and essential prerequisite to any valid act for the purpose of admitting a will to probate is to get the original instrument into court; and for this purpose, the courts are given power to resort to attachment, arrest, imprisonment, and other summary remedies.—*Meyers v. Smith*, 50 Kan. 1, 31 Pac. 670, 673. A formal petition for the probate of a will is usual but not absolutely necessary under the statute of the state of Washington.—*In re Pierce's Estate*, 63 Wash. 437, 115 Pac. 836. A petition stating jurisdictional facts is a necessary prerequisite to the probate of a will.—*Burke's Estate*, *In re*, 66 Or. 252, 256, 134 Pac. 11. The provisions of section 1300 of the Code of Civil Procedure of California, relating to the essential contents of a petition for the probate of a will, besides the statement of jurisdictional facts required by subdivision 1 of that

section, are directory in so far as non-compliance therewith affects the jurisdiction of the court.—*Nicholson v. Leatham*, 28 Cal. App. 597, 153 Pac. 965, 155 Pac. 98.

REFERENCES.

Probate of will is void for want of jurisdiction when.—See note 33 Am. Dec. 239-243. When an instrument executed with the formalities of a will, but not couched in formal testamentary phraseology, may be admitted to probate.—See note 41 L. R. A. (N. S.) 39. Contents of will as affecting right to probate.—See note 34 L. R. A. (N. S.) 963.

(3) As to non-residents.—A court has jurisdiction to grant original probate of a will of a non-resident, where he has left property within this state.—*Estate of Edelman*, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 962, 964; *Estate of Clark*, 148 Cal. 108, 113 Am. St. Rep. 197, 7 Ann. Cas. 306, 1 L. R. A. (N. S.) 996, 82 Pac. 760, 761. The exercise of original jurisdiction over the estates of non-residents, affects, and can affect, only the property within the state. Therefore a judgment admitting a will to probate, in a foreign state, is valid in all other states only as to the property within the jurisdiction of the court pronouncing the judgment. It has no extraterritorial force, establishes nothing beyond that, and does not dispense with, nor abrogate the formalities and proofs which may be exacted by other jurisdictions in which the deceased also left property subject to their laws of administration.—*Estate of Clark*, 148 Cal. 108, 113 Am. St. Rep. 197, 7 Ann. Cas. 306, 1 L. R. A. (N. S.) 996, 82 Pac. 760, 772. The court was without jurisdiction to admit to probate in the state of Washington a will probated in other state, where it was shown that the only property ever owned by the decedent in the state of Washington, and which he had sought to dispose of by said will, was the property of his widow, given voluntarily to her by her husband, and over which she had exercised all the rights of possession and ownership for a long period of time, and of which decedent was not in possession at the time of his death.—*In re Bushnell's Estate* (Wash.), 182 Pac. 89, 90.

(4) Issues properly triable.—In a proceeding to probate a will under the statutes of Oklahoma the only issue triable is the factum of the will or the question of *devisavit vel non*.—*Taylor v. Hilton*, 23 Okla. 354, 18 Ann. Cas. 385, 100 Pac. 537; *Letts v. Letts* (Okla.), 176 Pac. 234, 236; *In re Allen's Will*, 44 Okla. 392, 144 Pac. 1055, 1056. In a proceeding to probate a will the inquiry is confined to whether the paper presented is, in fact, the last will and testament of a person legally competent to make a will, is it executed and attested with the formalities required by law, was the testator of sound and disposing mind and the execution of the will free from undue influence, duress, menace, or fraud.—*Bell v. Davis*, 55 Okla. 121, 155 Pac. 1132, 1133. Where on a trial of the issue of *devisavit vel non* the court finds the testamentary paper produced to be the last will of the deceased, it is

error to reject any portion of it.—*Taylor v. Hilton*, 23 Okla. 354, 18 Ann. Cas. 385, 100 Pac. 537.

(5) *Issues not triable.*—In a proceeding to probate a will the only issue triable is the factum of the will, or *devisavit vel non*, and in such a proceeding the court lacks jurisdiction to construe the will to determine the rights of the parties, or the validity of any devise therein.—*Letts v. Letts* (Okla.), 176 Pac. 234, 236; *Bell v. Davis*, 55 Okla. 121, 155 Pac. 1132, 1133; *Nesbit v. Gragg*, 36 Okla. 703, 129 Pac. 705; *Chouteau v. Chouteau*, 51 Okla. 744, 152 Pac. 373. In determining whether an instrument proffered for probate is or is not a will the court ordinarily can not investigate the construction, resolve inconsistencies in the disposition of property, or construe the provisions of the instrument, such being matters properly for a subsequent inquiry.—*Estate of Cook*, 173 Cal. 465, 160 Pac. 553. In a proceeding to probate a will the court can not construe or interpret the will or distinguish between valid and void dispositions, and the will must be admitted to probate, if the will be legally executed and proved and not successfully attacked for want of testamentary capacity, undue influence, fraud, or duress.—*Brock v. Keifer*, 59 Okla. 5, 157 Pac. 88, 90. The question of property rights of devisees, legatees, heirs, and others which might arise out of the construction of the terms of a will, and which could only be decided between such persons when made parties to the record in a proper proceeding for such purpose, is not to be determined in a proceeding for the probate of a will, where only the abstract question of a will or no will valid under the law is at issue.—*Bell v. Davis*, 43 Okla. 221, 229, Ann. Cas. 1917C, 1075, 142 Pac. 1011. The validity or invalidity of specific devises or bequests can not be considered on the application for probate of a will. Such questions are to be tried and determined by appropriate proceedings after the will has been admitted to probate.—*In re Hobbins' Estate*, 41 Mont. 39, 108 Pac. 7, 9.

(6) *Destruction of will as affecting.*—The destruction of a will, and, therefore, inability to prove its contents by two witnesses, as required by statute, does not take jurisdiction out of the probate court and vest the same in a court of chancery. The end and object sought to be obtained by the framers of the code was the enactment of a full, complete, and comprehensive probate procedure, in which the probate court would have exclusive power to hear and determine, no matter what may be the nature and character of the will, and no matter what may be its situation and condition.—*McDaniel v. Pattison* (Cal.), 27 Pac. 651, 654.

(7) *Involves power to postpone hearing.*—Jurisdiction to hear and determine a proceeding for the probate of a will, as in any cause or proceeding, involves the power to postpone, for good cause, the time of hearing, unless prohibited by positive law.—*Curtis v. Underwood*, 101 Cal. 661, 36 Pac. 110, 112.

4. Parties.

(1) Who may apply for probate.—An infant may institute a proceeding, by a next friend, for the probate of a will.—*Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738. Generally speaking, the person who petitions for the probate of a will is one interested in sustaining the validity of the proffered instrument, but it is by no means necessary that he should be such person. The purpose of the petition is to give jurisdiction to the court, and jurisdiction having been obtained, it becomes the duty of the court, with or without contest, to take all necessary and proper evidence to the end of determining whether or not it be a legal expression of a testamentary intent.—*Estate of Edwards*, 154 Cal. 91, 97 Pac. 23, 24. A person named as executor and legatee is a proper party to petition for the probate of a will.—*Estate of Olmstead*, 120 Cal. 447, 451, 52 Pac. 804. A creditor, though not a person interested in upholding a will, may petition for its probate.—*Estate of Edwards*, 154 Cal. 91, 97 Pac. 23, 24. The court may permit both the proponent and contestant, on an application for the probate of a will, to offer testimony, both of the attesting and other witnesses, as to the testamentary capacity of the deceased at the time of the alleged execution of the will.—*In re Robb*, 12 Colo. App. 489, sub nom. *In re D'Avignon's Will*, 12 Colo. App. 489, 55 Pac. 936. Upon the hearing of the petition for probate, the matter of the appointment of an attorney for absent heirs, and the allowance to him of a fee, are matters entirely within the discretion of the probate court. If such allowance be improvident or indiscreet, the court may vacate it, at the suggestion of any one, or upon its own motion.—*Estate of Rety*, 75 Cal. 256, 17 Pac. 65.

REFERENCES.

What persons are bound by probate, and refusal of probate, of wills.—See note 60 Am. Dec. 353-361.

(2) Who can not oppose probate.—A stranger and a trespasser will not be permitted to question the will of a decedent, where the same is not questioned by the heirs named therein.—*Cullen v. Bowen*, 36 Wash. 665, 79 Pac. 305. The law will not permit a legatee to accept, first, a legacy under a will, with full knowledge of the circumstances, and afterwards to attack its sufficiency, upon tendering back what he had received. In such a case, the legatee is estopped from raising the question of the insufficiency of the attestation and probate of the will.—*Lanning v. Gay*, 70 Kan. 353, 78 Pac. 810, 85 Pac. 407, 408. A public administrator has no interest in the estate of a decedent that entitles him to object to the probate of the will.—*State v. District Court*, 34 Mont. 226, 85 Pac. 1022, 1023. See also *Estate of Sanborn*, 98 Cal. 103, 38 Pac. 165.

REFERENCES.

Who may oppose the probate of a will.—See note 68 Am. Dec. 447, 448.

5. Notice of application for probate.—Personal service of copies of the notice of the time and place for probating a will is equivalent to service by mailing.—Estate of Hamilton, 120 Cal. 421, 430, 52 Pac. 708. Where notice of the time and place of probating a will is given, the failure to adjourn the hearing, from time to time, and to give a new notice for a later day, when the matter was in fact taken up, is, at most, only an irregularity, occurring after jurisdiction had been acquired.—Estate of Warfield, 22 Cal. 51, 83 Am. Dec. 49; Estate of Davis, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183, 185, 90 Pac. 711. A statute relative to the notice to be given for the application for the probate of a will, is not invalid as to non-residents who have no actual notice, where, although notice could not reach all such non-residents interested before probate, a further provision of the statute gives the right to contest probate at any time within one year after probate.—Tracy v. Muir, 151 Cal. 363, 121 Am. St. Rep. 117, 90 Pac. 832, 834. A code provision which relates exclusively to publication by state officers, and commissioners, common councils, boards of trustees, or supervisors, in counties, cities, cities and counties, or towns, is inapplicable to the provisions of the code relating to publication of notice of hearing for the probate of wills.—Estate of Melone, 141 Cal. 331, 333, 74 Pac. 991. The statute which provides for only ten days' notice to non-resident heirs, of the hearing of an application for the probate of a will, is not unconstitutional on the ground that the period is too short, and that the heir is therefore deprived of his property "without due process of law." Neither does such statute violate the federal constitution because it requires personal notice to known heirs, residents of the state, while as to non-resident heirs, no personal notice is demanded. The rights of the non-resident heirs are in no way concluded by the decree of probate. They have an entire year thereafter in which to attack the will, and they may attack it upon the same grounds, and for the same reasons, that they could have attacked it prior to its probate. Public policy demands that a will shall have a speedy probate, and the legislature, recognizing that fact, has given the heir, by express enactment, one year after such probate has been decreed within which to attack the will.—Estate of Davis, 136 Cal. 590, 596, 69 Pac. 412, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183. The statutes do not prescribe any particular form of proof that notice of the hearing of an application to probate a will was given, nor require that the proof of publication shall be placed on record in any prescribed form.—Stead v. Curtis, 205 Fed. 439, 123 C. C. A. 507. Jurisdiction having once been acquired by a court of record, it will be presumed that the parties had due notice of all subsequent proceedings, unless the record affirmatively shows the contrary.—Stead v. Curtis, 205 Fed. 439, 123 C. C. A. 507. The presumption arising from the recital in a decree admitting a will to probate, that it was proved that due notice of the hearing had been given, is not overcome by the presence in the files of an incomplete

affidavit of publication.—*Stead v. Curtis*, 205 Fed. 439, 123 C. C. A. 507. In section 1301 of the Code of Civil Procedure of California, whereby failure for thirty days, on the part of a person named as executor in a will, to petition the proper court for the probate of the instrument is to be regarded as a renunciation of the right, the renunciation referred to is in no sense the equivalent of a voluntary renunciation.—*Estate of Randall*, 177 Cal. 363, 170 Pac. 835.

REFERENCES.

Presumption that probate proceedings were regular, arising from lapse of time.—See note *Ann. Cas.* 1913A, 1038.

6. Pleadings.

(1) *Petition for probate.*—No particular form of petition is prescribed to invoke the action of the court to the probate of a will. All that is necessary, is to exhibit the will for probate with such proof as shows that the testator is deceased, and that he was, at the time of his death, a resident of the county. A verification of the petition, if required, is waived if no objection is taken to a want of verification.—*Moore v. Willamette T. & L. Co.*, 7 Or. 359, 167. Under the present procedure in California, a petition is necessary to confer upon the court jurisdiction to probate a will.—*Estate of Edwards*, 154 Cal. 91, 97 Pac. 23, 24; though, under the earlier probate procedure of that state, no petition was required.—*Estate of Howard*, 22 Cal. 395. It is not required that the petition for the probate of a will be verified.—*Estate of Edwards*, 154 Cal. 91, 97 Pac. 23, 24.

(2) *Issues.*—The issues, upon an offer of a will for admission to probate are, whether the will was duly attested and executed, and whether the testator at the time of executing the same was of full age and of sound mind and memory, and not under any restraint. The burden of proving these things rests upon the proponent of the will.—*Bethony Hospital Co. v. Hale*, 69 Kan. 616, 77 Pac. 537, 538. In the probating of a will, whatever may be the form of procedure, or in whatever court the proceedings may be had, only one ultimate fact is to be ascertained and determined,—was the writing the last will of the testator, as it purported to be.—*In re D'Avignon's Will*, 12 Colo. App. 489, 55 Pac. 936, 937. The Kansas statute, providing that any person, interested in having the application for the probate of a will denied, may demand the right to have his witnesses examined in opposition, does not change or enlarge the issues involved, so as to authorize a contest of the will in the probate court.—*Wright v. Young*, 75 Kan. 287, 89 Pac. 694, 696.

7. Burden of proof.

(1) *In general.*—The burden of proof is primarily upon the proponent of a will, to show its execution in accordance with the requirements of the law, and that the instrument is the free and voluntary act of the testator. Likewise, the burden of proof to show undue

influence, is upon the one who asserts it.—*Snodgrass v. Smith*, 42 Colo. 60, 15 Ann. Cas. 548, 94 Pac. 312, 313. While the burden of proof rests upon the proponent of a will to establish its validity, only a *prima facie* showing is required to authorize a will to be admitted to probate.—*McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540, 541. It is incumbent upon the proponent of a will to make satisfactory proof thereof, and, if he fails to do this to the satisfaction of the trial court, it is the duty of the court, even without opposition, to refuse probate to the purported will.—*Estate of Hayden*, 149 Cal. 680, 87 Pac. 275, 276. Where a will has been probated "in common form," or by proceedings wholly *ex parte*, as in this case, and the validity of the will is attacked by a direct proceeding, it is incumbent upon the person seeking to maintain the validity of the will to probate the same *de novo*, by original proof, in the same manner as if no probate thereof had ever been had. In every such proceeding, the *onus probandi* lies upon the party propounding the will; and he must prove every fact that is not waived or admitted by the pleading, necessary to authorize its probate in the county court.—*Hubbard v. Hubbard*, 7 Or. 42, 44. The burden of proof to establish testamentary capacity rests in the first instance on the proponent of the will.—*In re Dale's Estate*, *Tobias v. Mathews* (Or.), 179 Pac. 274; *Johnson v. Shaver* (S. D.), 172 N. W. 676. Where an executor files a will for probate, the burden is on him to establish the testamentary capacity of the deceased by a preponderance of testimony.—*In re King's Estate* (*King v. Tonsing*), 87 Or. 236, 170 Pac. 319. The burden of proving the due execution of a will is on the proponent.—*In re Taylor's Estate*, *Ross v. Taylor*, 39 S. D. 608, 165 Pac. 1079. The person proposing a will for probate has, in case of contest, the burden on him of establishing every fact necessary to the validity of the instrument, including the testator's mental capacity.—*Darby v. Hindman*, 79 Or. 223, 153 Pac. 56. The proponent of a will must make the preliminary proof required by statute as to the execution of the will and the soundness of the mind of the testator, whereupon, in case of a contest, the burden shifts to the contestant to prove the matters set forth in the objections filed.—*Dickey v. Dickey* (Okla.), 168 Pac. 1018, 1020. Where a petition for the probate of a will and a contest is tried together the burden is upon the proponent of the will to make a *prima facie* case, or to make satisfactory proof of the due execution of the will, and, when this requirement is complied with by proponent, the burden is upon the contestant to prove the allegations of his petition of contest.—*Tiger v. Peck* (Okla.), 176 Pac. 529, 530. The burden is upon the proponent of a will, which contains unjust or unnatural provisions, to prove a reasonable explanation of the unnatural character of the will; the court must, from all the evidence, be led to believe that undue influence did not produce the unjust or unnatural disposition.—*Johnson v. Shaver* (S. D.), 172 N. W. 676, 678.

(2) **Presumption of sanity.**—The general rule that all persons are presumed sane until the contrary appears does not apply in proceedings for the probate of a will. There must be sufficient proof to make out a *prima facie* case of the sanity of the testator, at the time the will was made, as one of the jurisdictional facts.—*In re Baldwin's Estate*, 13 Wash. 666, 43 Pac. 934, 935.

8. Evidence.

(1) **Testimony of subscribing witnesses.**—The question as to whether the testator was conscious and possessed of testamentary capacity, should be determined from the facts and circumstances surrounding the transaction. The fact that subscribing witnesses gave testimony tending to weaken the force of the attestation of the will, does not invalidate the same, nor is it conclusive as to the testamentary capacity of the testator. The will may be established even in opposition to the testimony of such witnesses.—*In re Shapter's Estate*, 35 Colo. 578, 117 Am. St. Rep. 216, 6 L. R. A. (N. S.) 575, 85 Pac. 688, 691; *Trustees of Auburn Cemetery v. Calhoun*, 25 N. Y. 422. It is not necessary that the testator give an express direction where the will is authenticated, apparently, both by the mark of the testator (he being unable to write), and the name of the testator. The direction to write his name may be proved by the circumstances.—*Pool v. Buffman*, 3 Or. 428, 441. A probate judge, on hearing testimony as to the execution of a will, is not bound to accept the testimony of witnesses to the execution, but may pass upon it, and the credibility of the witnesses, as in other cases; and, if all the evidence, circumstances, facts, and probabilities in the case convince him that certain testimony is not credible, it is his duty to disregard it.—*Estate of McDermott*, 148 Cal. 43, 82 Pac. 842, 843. The husband of a legatee in a will is a competent witness to its execution in a proceeding in the probate court to establish the will. Such a proceeding is not in the category of a civil action, but may be classed as a special proceeding, although the latter is not defined by the statute.—*Lanning v. Gay*, 70 Kan. 353, 78 Pac. 810. The mental capacity of the testator is to be tested as of the date of the execution of the will, and other things being equal, the evidence of the attesting witnesses, and next to them, all those present at the execution, is to be most relied upon.—*In re Pickett's Will*, 49 Or. 127, 89 Pac. 377, 382. See *Chrisman v. Chrisman*, 16 Or. 127, 18 Pac. 6. Where the statute requires three witnesses to a will or codicil, the probate judge has no power to admit a codicil to probate that was attested by only two witnesses.—*Perea v. Barela*, 6 N. M. 239, sub nom. *Garcia y Perea v. Barela*, 27 Pac. 507, 508. The proponent of a will is entitled to show that the steps constituting a valid execution of the will had been taken, by oral testimony, including subscription in the presence of the witnesses, declaration by the maker that it was his will, and a request that the witnesses sign as such.—*Estate of Dutcher*, 172 Cal. 488, 490, 157

Pac. 242. At the time of proving a will, both attesting witnesses, if in the county, must be called and examined; other testimony, under the circumstances, not being receivable to the exclusion of theirs; but their testimony, when received, does not necessarily bind either party.—*In re Williams' Estate*, *Williams v. Davis*, 50 Mont. 142, 145 Pac. 957. Under the requirements of the Colorado statute governing the execution, proof, and probate of wills, considered at large, the word attested, by intent of the legislature, includes not only the mental act of observing, but as well the manual one of subscription; and further that such subscription must, by the express terms of the statute, be in the presence of the testator, so that where two persons saw a testator execute a purported codicil and heard him declare it to be such, but only one of them subscribed it in his presence, though the other subscribed it out of his presence, it is insufficiently attested.—*International Trust Co. v. Anthony*, 45 Colo. 474, 16 Ann. Cas. 1087, 22 L. R. A. (N. S.) 1002, 101 Pac. 782. The statute requires that publication by the testator, that the will is his, must be proved by both witnesses, and the requirement can not be overcome by showing that one of the witnesses is unworthy of belief.—*In re Williams' Estate*, *Williams v. Davis*, 50 Mont. 142, 145 Pac. 957. It is the will itself, rather than his signature thereon, that the testator acknowledges before the subscribing witnesses. *Estate of Carey*, 56 Colo. 77, 82, Ann. Cas. 1915B, 951, 51 L. R. A. (N. S.) 927, 136 Pac. 1175. The statute whereby objections to the validity of a will must be availed of by a writing setting them forth, or by a caveat filed on or before the day set for the probate hearing, applies only to objections appearing on the face of the instrument. § 7095 Rev. Stat.—*Hodgkins v. Ashby*, 56 Colo. 553, 556, 139 Pac. 538. If a person, named in a will as executor, petitions for the probate of the instrument, alleging that real property specified belonged to the decedent, and otherwise proceeds with the administration as though conceding his decedent's rights in all things in respect to the estate, and accepts money distributed to him as legatee, he can not have disposition, under the will, to other persons set aside in his own interest, on the ground of a parol agreement between the decedent and himself.—*In re Parkes' Estate*, *Parkes v. Burkhart*, 101 Wash. 659, 172 Pac. 908. In proceedings to probate a will the proponent is entitled to show that the steps constituting a valid execution of a will were taken. These steps include the subscription of the will in the presence of witnesses, the declaration that it is a will, and the request that the witnesses sign as such. If this testimony show that the testator subscribed "at the end" before either of the witnesses signed, it can not be said because of it that the testimony has been introduced to show "testamentary intent."—*Estate of Dutcher*, 172 Cal. 488, 157 Pac. 242. It is for the jury to decide which one it will believe, as between two persons whose names appear on a will as witnesses, if there is a conflict in the testimony of these two on the

point of publication of the instrument as a last will and testament.—*In re Williams' Estate, Williams v. Davis*, 52 Mont. 192, Ann. Cas. 1917E, 126, 156 Pac. 1087. A subscribing witness to a will, who testifies directly to all the requirements of the statute for the attestation and acknowledgment of the instrument, except as to the presence of the testator's signature thereon at the time he signed, is a sufficient witness, *prima facie*, for the purposes of probate.—*Estate of Carey*, 56 Colo. 77, 136 Pac. 1175.

REFERENCES.

Effect of adverse testimony of attesting witnesses as to execution of will, referring to decisions in favor of probate and to decisions against probate.—L. R. A. 1916C, 1219-1245. Proof of signature by mark when attesting witnesses are dead or can not remember.—See note 44 L. R. A. 142-147. Evidence as to testamentary capacity.—See notes 36 L. R. A. 66-68, 36 L. R. A. 724-726. Weight of testimony of subscribing witness against competency of testator.—See note 6 L. R. A. (N. S.) 575-577. Subscribing witnesses to be produced and examined upon hearing for petition for probate,—failure to produce, effect of.—See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1315.

(2) As to mental capacity and undue influence.—If a testator is proved by the attesting witnesses, and by others besides, to have been of sound and disposing mind at the time of the execution of the will, evidence of a disturbed mental condition shown by him four days earlier is immaterial.—*Morrison v. Castillo*, — Ariz. —, 173 Pac. 417. The fact that one offering a will for probate must prove the testator to have been of sound mind while making it, renders the will of a lunatic of no value to the person having it in custody.—*Pond v. Faust*, 90 Wash. 117, Ann. Cas. 1918A, 736, 155 Pac. 776. Unjust and unnatural bequests or devises are not alone sufficient evidence of mental incapacity or undue influence, but they are circumstances entitled to consideration and weight on both issues, and they may be sufficient to impose on the proponent the necessity of giving some reasonable explanation; a will which produces unnatural and unjust results demands close judicial scrutiny.—*Johnson v. Shaver*, — S. D. —, 172 N. W. 676. Any witness who has "a fair basis for an opinion" concerning the mental condition of another is qualified to testify on the subject; and it is for the trial court to determine whether there is or is not such "a fair basis."—*Durant v. Whitcher*, 97 Kan. 603, 156 Pac. 739. There is no substantial difference between asking a witness his opinion of the mental condition of another and asking him what that condition was; but the error of admitting any such testimony is immaterial, unless it is shown to have affected the judgment.—*Durant v. Whitcher*, 97 Kan. 603, 156 Pac. 739. The declaration of a testator, made previous to the execution of his will, and indicating a purpose inconsistent with the provisions thereof, is competent and relevant in connection with other evidence as tending to show susceptibility to undue influence.—*Johnson v. Shaver* (S. D.), 172 N. W. 676. Where

a testator, prior to the execution of his will, made a declaration indicating a purpose inconsistent with its provisions, such declaration is competent and relevant on the question of testamentary capacity.—*Johnson v. Shaver* (S. D.), 172 N. W. 676. A testator who, in making a will, understands the nature and consequences of his acts, and is free from duress, menace, fraud, and undue influence, has testamentary capacity.—*Dickey v. Dickey* (Okla.), 168 Pac. 1018, 1019. The keeping of the existence of a will secret from those who have an equal right to know of its existence is a badge of undue influence.—*Johnson v. Shaver* (S. D.), 172 N. W. 676, 678. The lawyer who drew the will, sought to be set aside, is competent to testify in respect to conversations had by him with the testator at the time.—*Durant v. Whitcher*, 97 Kan. 603, 156 Pac. 739. If mental incapacity exists, rendering one incompetent to make a will, there can not be undue influence in a legal sense, as the existence of undue influence presupposes a will which, without such influence, would have been valid.—*Johnson v. Shaver* (S. D.), 172 N. W. 676, 678. Evidence showing that a testatrix, 87 years of age, was mentally capable of making a will.—*In re Dale's Estate*, *Tobias v. Mathews*, 92 Or. 57, 179 Pac. 274.

(3) As to identity of persons misnamed.—The identity of persons misnamed in wills may be ascertained by parol evidence of facts and circumstances.—*Wilson v. Stevens*, 59 Kan. 771, 51 Pac. 903, 904. The subject of the testator's bounty may be ascertained by parol, if not sufficiently expressed in the instrument. For the purpose of determining the object of his bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, the court may inquire into every material fact relating to the person who claims to be interested under the will, as to the property which is claimed to be the subject of disposition, and the circumstances of the testator and of his family and affairs.—*Smith v. Holden*, 58 Kan. 535, 50 Pac. 447, 449.

(4) Wills executed by blind persons.—It is not absolutely required, in the proof of wills executed by blind persons, that the witnesses should be able to depose that the testator was cognizant of the contents of the paper, which he declares to be his will, and desires the witnesses to attest. But where the evidence shows, conclusively, that the will was read over to such testator by his trusted attorney on the same day, and shortly before its execution, and that the terms of the will were in conformity with the wishes of the testator, as expressed by him to his attorney some time before that, the proponents, in such case, are not reduced to the extremity of having to rely upon merely a *prima facie* case as to the due execution of the will.—*In re Pickett's Will*, 49 Or. 127, 89 Pac. 377, 382.

(5) Presumptions as to the will.—The legal presumption is that when a will has been executed in conformity with the requirements of the statute relating to wills, it continues to exist until the death of

the testator.—*Caeman v. Van Harke*, 33 Kan. 333, 6 Pac. 620. Soundness of mind is presumed in the absence of evidence disproving it.—*Estate of Cullberg*, 169 Cal. 365, 146 Pac. 838. Where a will, rational on its face, is, by the testimony of the subscribing witnesses, shown to have been executed in legal form, the law presumes testamentary capacity in the testator and that the will speaks his wishes.—*In re Hanson's Estate*, *Hanson v. Rhodes*, 87 Wash. 113, 151 Pac. 264. Courts will presume the sanity of a testator until that presumption is overthrown by competent and reliable evidence to the contrary.—*Pond's Estate v. Faust*, 95 Wash. 346, 163 Pac. 753. Where all the requirements of the statute regarding the acknowledgment and attesting of a will have been complied with, excepting that the witnesses could not remember, ten years afterward, whether or not the testator's signature was on the paper, in the absence of evidence to the contrary it is to be presumed that it was, and that the will was executed in accordance with the statute.—*In re Carey's Estate*, 56 Colo. 77, Ann. Cas. 1915B, 951, 51 L. R. A. (N. S.) 927, 136 Pac. 1175.

(6) Alteration of will. Effect of.—An alteration of a will ought not raise a presumption against the instrument, because the law never presumes wrong. The question as to the time of alteration, is, in the last instance, one for the court or jury. It is, like any other fact in the case, to be settled by the trier or triers of the facts.—*Scott v. Thrall*, 77 Kan. 688, 127 Am. St. Rep. 449, 17 L. R. A. (N. S.) 184, 95 Pac. 563, 564.

REFERENCES.

Burden of explaining erasures or alterations appearing on face of will.—See note 17 L. R. A. (N. S.) 184-186.

(7) Will on different sheets of paper.—Where a will offered for probate consists of several separate sheets not permanently fastened together, only the last one bearing the signature of the testator, the connection of the subject-matter may be sufficient to establish *prima facie* the identity of the other sheets.—*Sellards v. Kirby*, 82 Kan. 291, 136 Am. St. Rep. 110, 20 Ann. Cas. 214, 28 L. R. A. (N. S.) 270, 108 Pac. 73.

(8) Practice and procedure.—If, after one person files a petition for the probate of a will, another files a contest of the will as having been not duly executed by the decedent, the court may, in its discretion, before proceeding with the contest, require the proponent to present his evidence of the execution.—*Estate of Smith* (Cal.), 171 Pac. 289. If, on a will's having been presented for probate, the court orders the proponent to introduce evidence of the execution of the instrument, a refusal by the proponent to proceed as ordered justifies the court in denying the probate.—*Estate of Smith* (Cal.), 171 Pac. 289. On a court's denying probate of a will, evidence of the execution of which the proponent declines to produce, no findings are necessary, the case being practically a nonsuit.—*Estate of Smith* (Cal.), 171 Pac. 289.

Where, by reason of invalid and therefore unenforceable provisions in the later of successive wills by the same testator, such will fails to dispose of the entire estate and it becomes necessary to admit the earlier will so as to cure the deficiency, the two wills may be admitted at the one time, or the earlier admitted only after it is found to be indispensable.—Estate of Marx, 174 Cal. 762, 164 Pac. 640. Where, of successive wills by the same testator, the later, by reason of invalid and therefore unenforceable provisions therein, fails to dispose of the entire estate, both instruments are to be admitted, so that the later may be enforced as far as valid, and the earlier to supply the deficiency.—Estate of Marx, 174 Cal. 762, 164 Pac. 640.

9. Order or decree admitting will to probate.

(1) In general.—A will can not be admitted to probate as to one part, and denied probate as to the remainder.—Estate of Pforr, 144 Cal. 121, 77 Pac. 825. If the county court, in a proceeding for the probate of a will, makes and files findings and conclusions, and subsequently makes and files a separate document purporting to be the judgment, this so-called judgment should be regarded as a completion or amendment of the previous document containing the findings, and both documents, taken together, constitute the final decree.—In re Lemery's Estate, 15 N. D. 312, 107 N. W. 365. An order, upon a motion to vacate an order admitting a will to probate, where the motion was not made within the time prescribed by the statute, is, where allowed, erroneous and void, unless the order admitting the will to probate was itself void on its face.—Estate of Dunsmuir, 149 Cal. 67, 84 Pac. 657. The filing by the clerk of an order signed by the judge in open court is not an essential or necessary part of the making of the order, or of the date of the admission of the will to probate; and the fact that it was filed five days after the admission of the will to probate was immaterial.—Estate of Parsons, 159 Cal. 425, 114 Pac. 570. The conclusion of the court in admitting a will to probate does not rest upon the fact that the will was signed with testamentary intent, but follows from the face of the paper itself as that paper stands after the testator has completed the signing.—Estate of Dutcher, 172 Cal. 488, 490, 157 Pac. 242. An order admitting a will to probate is not void for lack of jurisdiction by reason of the absence of a statement, in the petition, of the names, ages, and residences of the heirs, legatees, and devisees of the decedent.—Nicholson v. Leatham, 28 Cal. App. 597, 153 Pac. 965, 155 Pac. 98. Upon a consolidated application to probate three wills of the same testatrix where the evidence showed that subsequent to the death of her husband and after the date of the first will her mind was so weakened from either mental or physical infirmities that she did not have sufficient intelligence to understand the nature and effect of making a will or else had lost the mental power to resist the importunities of those around her, an order admitting the first will to probate was proper.—In re Jeff's

Estate, 73 Wash. 212, 131 Pac. 849. A deed made between husband and wife by which each purported to give all his or her interest in community property to the other, to take effect after the death of one or other of them, with remainder over after the death of the survivor to the heirs at law of both, held to be a mutual or reciprocal will and the separate will of the survivor, and after the death of the wife and revocation by the husband by a remarriage, entitled to probate as the will of the deceased wife.—*Anderson v. Hande* (Ariz.), 141 Pac. 726. An instrument is not entitled to probate as a will, unless it shows an intent by the signer to dispose of his or her property.—*In re Anderson's Estate*, 173 Cal. 235, 159 Pac. 426.

REFERENCES.

Right to probate will after distribution of property as intestate.—See note 36 L. R. A. (N. S.) 89.

(2) *Void statute.*—The amendment of 1907 to section 1349 of the Code of Civil Procedure of California, providing that in the order admitting the will to probate, "the court must ascertain and determine whether said estate is worth more or less than \$10,000, which determination is conclusive for the purpose of giving notice to creditors," is void as being special legislation prohibited by section 25 of article IV of the constitution, there being no similar provision applicable to intestate estates and a class is thereby created which is not founded upon any natural, intrinsic, or constitutional distinction.—*Estate of Becker*, 20 Cal. App. 513, 129 Pac. 795.

(3) *Effect of decree.*—An order admitting a will to probate, though made in an informal manner, is as binding and conclusive as though made in a formal manner. Real estate passes under the will, upon such admission to probate, and does not descend to the heirs of the testator.—*Chandler v. Richardson*, 65 Kan. 152, 69 Pac. 168, 170. Under the system, as it exists in the state of California, for the admission of wills to probate, the determination of the question of genuineness of an instrument purporting to be a will, is solely and exclusively for the court to which the proof of wills is committed, and its decision therein is final and conclusive; and, in the absence of state law, statutory or customary, providing otherwise, such decision is not subject, except on appeal to a higher court, to be questioned in any other court, or to be set aside or vacated by a court of chancery on any ground.—*Tracy v. Muir*, 151 Cal. 363, 121 Am. St. Rep. 117, 90 Pac. 832; *O'Callaghan v. O'Brien*, 199 U. S. 89, 50 L. Ed. 101, 25 Sup. Ct. 727; *Broderrick's Will Case*, 21 Wall. (U. S.) 503, 20 L. Ed. 599; *State v. McGlynn*, 20 Cal. 233, 266, 81 Am. Dec. 118; *Langdon v. Blackburn*, 109 Cal. 19, 41 Pac. 814. The effect of a valid probate of a will devising real estate, until such probate is duly set aside, or the will declared void in appropriate proceedings is, at least, to confer upon the executor constructive possession of all the real estate devised until the estate is settled, and, where a trust is created, to confer the same upon the

trustee of the devisees until the trust is fully performed. Plaintiffs, therefore, in an action which they bring to quiet their title as the result of the obtaining of a decree declaring the will void, can not be heard to say that, as heirs, they are constructively in possession of the real estate devised in the will. The allegation of their complaint that they are in possession as heirs at law is controlled by other allegations of the complaint which show that the possession which the plaintiffs must have in order to maintain their action is in one of the defendants as trustee. Such an action resolves itself into an action to overthrow, not to construe, the will, and can not be maintained under the statute.—*Chilcott v. Hart*, 23 Colo. 40, 35 L. R. A. 41, 45 Pac. 391, 392, 393. The decision of a probate court admitting a will to probate can not be impeached on collateral attack, even though the will be void.—*Ward v. Board of Commissioners*, 12 Okla. 267, 70 Pac. 378, 382. A testator may be described in the will as being of a city and county of the state of South Dakota, and the will may be probated in such county, but the judgment of the court admitting the will to probate is an adjudication of jurisdiction over the will and not for subsequent purposes in the matter of the estate.—*In re James' Estate*, *Bigelow v. Booth*, 38 S. D. 107, 115, 160 N. W. 525. In determining the venue for the probate of a will, under subdivisions 1 and 2 of the South Dakota statute, where either one or the other of these subdivisions is applicable to the will, dependent upon where the decedent's residence was, jurisdiction attaches under one particular subdivision of that section to the exclusion of the other; the judgment admitting the will to probate, constitutes an adjudication of jurisdiction over the will, but not an adjudication for subsequent purposes in matters of the estate.—*In re James' Estate*, *Bigelow v. Booth*, 38 S. D. 107, 116, 160 N. W. 525.

(4) Establishes the will prima facie.—A probated will is prima facie valid.—*Scott v. Thrall*, 77 Kan. 688, 127 Am. St. Rep. 449, 17 L. R. A. (N. S.) 184, 95 Pac. 563, 565. The formal admission of a will, upon the evidence of the subscribing witnesses, establishes a prima facie case in favor of its validity; but it is merely a prima facie case.—*Rathjens v. Merrill*, 38 Wash. 442, 80 Pac. 754, 756. Under the Kansas statute of wills, the order of probate determines the due attestation, execution, and validity of the will; and, in the absence of a contest within the appointed time, it is forever binding, except as to those under legal disability.—*Keeler v. Lauer*, 73 Kan. 388, 85 Pac. 541, 544. A decree of distribution of the estate of a deceased person which has been administered as an intestate's estate, although it has become final, is not a bar to the subsequent admission to probate of the will of the decedent. The admission of such will to probate is not an attack, direct or collateral, upon the decree of distribution, and is authorized to establish the status of that instrument as a will, in order that the devisees and legatees claiming under it may be in a position to assert their rights in equity against the distributees as

involuntary trustees of the rightful owners of the property of the estate.—*Estate of Walker*, 160 Cal. 547, 36 L. R. A. (N. S.) 89, 117 Pac. 510.

(5) **Conclusiveness of decree.**—Where a will was probated under the Spanish and Mexican laws, in territory formerly belonging to Mexico, and such probate was in accordance with the law existing at that time and prevailing in that jurisdiction, the probate must be recognized and admitted in all courts as valid and conclusive; and an application made more than twenty years after the filing of the petition in the probate court to probate the will again, in accordance with the laws then in vogue, will not be entertained.—*Bent v. Thompson*, 5 N. M. 408, 23 Pac. 235, 239. If a court, having jurisdiction, admits a will to probate, the fact of the execution thereof by the testator can not be called in question, and, if the decree is not vacated on appeal, or successfully impeached in some known and recognized legal method, the decree is final and conclusive upon all persons.—*Jones v. Dove*, 6 Or. 188, 191. The probating of a will is a judicial act and as such it can not be avoided or set aside save in the manner provided by law and this is true even though the probate be in common form. Apparently the only difference between the finality of probate in solemn form and in common form is as to the time when the probate becomes conclusive. Probate in solemn form becomes conclusive upon rendering the decree to that effect because it is upon notice to all who are interested. Probate in common form becomes equally conclusive upon the expiration of the time fixed by statute for contesting the will after its probate, except as to certain persons under disability.—*Horton v. Barto*, 57 Wash. 477, 135 Am. St. Rep. 999, 107 Pac. 191, 194. The probate of a will in a county court of Oregon is conclusive, until vacated by appeal or impeached by a direct proceeding.—*Mansfield v. Hill*, 56 Or. 400, 408, 107 Pac. 471, 108 Pac. 1007. The decree of that court as to the validity of a will is conclusive upon that question, where no appeal has been taken from its admission to probate, or no direct proceeding has been brought to impeach such decree, within the time limited.—*Mansfield v. Hill*, 56 Or. 400, 406, 107 Pac. 471, 108 Pac. 1007. The probate of a will is conclusive unless a contest is instituted within the time limited by statute after such probate.—*State v. Superior Court*, 76 Wash. 27, 32, 135 Pac. 494. The admission of a will to probate or its rejection is final and conclusive as against all parties unless appealed from within the time provided by statute and in default thereof not even a court of equity has power to set the order of admission or rejection aside even on the ground of fraud, this being the one remarkable exception to the general rule as to the universality of equitable jurisdiction to relieve in cases of fraud.—*In re Hoscheid's Estate*, 78 Wash. 309, 139 Pac. 61, 63. The statute of Colorado declares that an order admitting a will to probate is conclusive as to the validity of the contents of the will only so far as determined at probate.—*Hodgkins v. Ashby*, 56 Colo. 553, 139 Pac.

538, 541. The probate of a will "in solemn form" is allowed under certain conditions under the laws of the state of Colorado after probate in common form, which latter method is conclusive of the validity of the will in all actions wherein its execution or contents are brought in question.—*In re Hayes's Estate*, 55 Colo. 340, Ann. Cas. 1914C, 531, 135 Pac. 449, 452. A party having been given legal notice of the protest of a will, on the ground that the testator was mentally incompetent, is, on the instrument's being admitted to probate, bound by the decree of admission so as to be unable to raise the point again.—*Estate of Allen*, 176 Cal. 632, 169 Pac. 364.

REFERENCES.

Probate of will, when conclusive.—See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1333. Conclusiveness of probate as *res judicata*.—See note 21 *L. R. A.* 680-689. Probate judgments, conclusiveness of.—See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1908, pars. 13-15.

(6) Decree annulling the will.—A will can not be annulled in part; it must be annulled in its entirety, or not at all.—*Estate of Freud*, 73 Cal. 555, 557, 15 Pac. 135; *Estate of Pforr*, 144 Cal. 121, 77 Pac. 825; *Estate of Dolbeer*, 149 Cal. 227, 246, 9 Ann. Cas. 795, 86 Pac. 695.

(7) Gives right to letters testamentary.—The naming of an executor is ordinarily a part of a will, and, in the absence of any objection to his competency, an order admitting a will to probate includes a right to have letters testamentary issued to him. Under a statute by which administration may be granted to one or more competent persons, a devisee or other person interested in the estate, is not entitled to the right to nominate an administrator with the will annexed.—*Estate of Richardson*, 120 Cal. 344, 52 Pac. 832, 833.

10. Probate of after-discovered will.—Where an administrator is appointed, on the theory that the deceased died intestate, it is the duty of the court, upon the subsequent production and proof of a will, to immediately revoke the administration previously granted, and to issue letters testamentary to the executor named in the will. The administrator, in such case, is not entitled to notice of the intended probate of the will.—*Malone v. Cornelius*, 34 Or. 192, 55 Pac. 536, 538.

11. What wills can not be admitted to probate.—Where in proceedings for the probate of the non-holographic will of a Creek Indian, it appeared that there were three witnesses, two of whom could speak only the English language, and that to the third witness alone, who understood the Creek language, the testator declared that the will was her will and that she requested the witnesses to sign as such, which was translated to the other two witnesses in English which the testator could not understand. Held, that probate of the will was properly denied, on the ground that decedent had made the necessary declarations to only one witness, two being required by the statutes of Oklahoma.—*Hill v. Davis* (Okla.), 167 Pac. 465, 466; *Cobb v. Davis*

(Okla.), 167 Pac. 465, 466. Where there has been a close confidential relation between the testator and the beneficiary, and the will affronts the claims of duty and affection, slight evidence of abuse of the confidence reposed will suffice to prove the will invalid.—*In re Diggins's Estate*, *Diggins v. Diggins*, 76 Or. 341, 149 Pac. 73. Where a testator, during marriage, gave all of his property to his wife and her son, but the wife died, and he married again, and died without having made any other will, leaving his second wife surviving, and no issue by either marriage, the will is unqualifiedly revoked, under a statute which provides that if, after making a will, the testator marries, and the wife survives the testator, the will is revoked. The will, under such facts and circumstances, can not be admitted to probate.—*In re Larsen's Estate*, 18 S. D. 335, 5 Ann. Cas. 794, 100 N. W. 738, 739. A paper drawn and signed manifestly not *animo testandi* is not entitled to probate as a will. Following *Tennant v. John Tennant Mem. Home*, 167 Cal. 570, 140 Pac. 242; *Estate of Keith*, 173 Cal. 276, 159 Pac. 705.—*Estate of Lowe*, *Lowe v. Lowe* (Cal.), 172 Pac. 583.

12. Admission to probate under special act.—Attesting witnesses to a will are required to prevent the setting up of fictitious wills against heirs and representatives. An unattested paper may, however, where the state alone is interested, be admitted to probate under a special act providing that this be done "the same as though it was executed in conformity with the general law."—*Estate of Sticknorth*, 7 Nev. 223, 234.

13. Probate of holographic will.

(1) In general.—A petition for the probate of a holographic will is not required to state whether the will is holographic, or any other species of will.—*Estate of Learned*, 70 Cal. 140, 142, 11 Pac. 587. At a proceeding for the probate of a holographic will, a finding that the paper was duly executed as a holographic will renders it unnecessary to call attesting witnesses before admitting the will to probate.—*Estate of Jepson*, 178 Cal. 257, 172 Pac. 1107, 1109. Where a paper is propounded as a holographic will, the essential thing is that it express a testamentary disposition of property and be wholly written and signed by the testator, and that it is so written may be proved in the same manner that other private writings are proved; it is immaterial in what part of it the signature may be placed.—*Estate of Tyrrell*, *Knauff v. Davidson*, 17 Ariz. 418, 424, 153 Pac. 767. There is no provision in the Washington statute whereby a holographic will can be admitted to probate.—*In re Brown's Estate*, 101 Wash. 314, 172 Pac. 247.

REFERENCES.

Holographic wills, how proved.—See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1309.

(2) Instruments entitled to such proof.—While an instrument purporting to be a holographic will, may, for failure to conform to the

statutory requirements, be invalid as such a will, the same may be incorporated by reference in a codicil complying with the requirements of the law regarding holographic wills, and becomes thereby, with such codicil, the will of the testator; and both, where offered for probate, as the will of the decedent, are properly admitted to probate as a holographic will.—Estate of Plumel, 151 Cal. 77, 121 Am. St. Rep. 100, 90 Pac. 192, 193. An instrument in the form following is entitled to probate as a will:

"Fresno, July 2th, 1906.

"I leave all the Busines I got To my wife Luiza Rosa Silva so that she got to pai all my deads and wages of the working men and all the bills that iroe to be in Count ect.

"Frank V. Silva.

"Antone J. Breves

"Joe M. Silva."

—Estate of Silva, 169 Cal. 116, 145 Pac. 1015. Where a purported holographic will is all in the handwriting of a decedent upon three sheets of paper of the same size and character and apparently torn from the same writing pad, folded together in proper sequence, a finding that the three sheets of paper form a continuous instrument constituting the last will and testament of the decedent is sufficiently sustained, although it appears that the three sheets of paper were not fastened together by a mechanical or other device.—Estate of Merryfield, 167 Cal. 729, 731, 141 Pac. 759. A writing, in form of a letter, left by a woman on departing on a journey, fully dated and signed, and addressed to a nephew and niece, may be admitted to probate as a holographic will, if no less specific than as follows: "I have stated to you before that I wish you to administer on my estate when it has to be. So will put it in writing. Distributed equally among my nieces and nephews. You receive your pay besides out of the estate."—In re Dexter's Estate, 179 Cal. 247, 176 Pac. 168. A letter by a property owner to a favored nephew, making direct reference to a conversation between the two in which the writer stated that she wanted the other to administer on her estate, and wanted the latter distributed among her nephews and nieces, such letter being in form of an addendum to written directions as to what her estate consists of and the location of her valuables, is admissible to probate as a holographic will making the nephew executor.—In re Dexter's Estate, 179 Cal. 247, 176 Pac. 168.

(3) Instruments not entitled to such proof.—An instrument purporting to be a will, but which is insufficiently proved, is not entitled to probate as a will; there must be proof not only that the testator executed the writing but that he understood the nature thereof.—In re Taylor's Estate, *Ross v. Taylor*, 39 S. D. 608, 614, 165 N. W. 1079. A will, executed at a time when the testator was semi-unconscious and incapable of comprehending his relation to the persons who were, or should, or might have been, the objects of his bounty, and incapable of comprehending the scope and bearing of the provisions of the instrument,

is not entitled to probate.—*Darby v. Hindman*, 79 Or. 223, 153 Pac. 56. A will can not be admitted to probate without a showing that it was executed according to statutory requirements.—*Estate of Cullberg*, 169 Cal. 365, 146 Pac. 888. A writing, though sufficient in form and execution as a holographic will, which it is manifest on its face that the writer did not intend it as a present disposition of his property, but merely expressed an intention to dispose thereof at some future time, is not a will and probate thereof is properly refused.—*In re Jensen's Estate*, 37 Utah 428, 108 Pac. 928. A holographic will with only the year written and with blanks for the day and month left unfilled, is not dated within the meaning of section 1297 of the Civil Code, and the court properly denied a petition for its probate.—*Estate of Price*, 14 Cal. App. 462, 112 Pac. 482. A paper, in the handwriting of its subscriber, which begins in manner and form "Winters Yo lo Co 10 1912," and is offered for probate as a holographic will, must be denied probate as not being dated as the statute requires for a will of that character.—*Estate of Carpenter*, 172 Cal. 268, L. R. A. 1916E, 498, 156 Pac. 464. A letter to a brother announcing the purchase of property and proposing that the brother participate with money to make up an unpaid balance of the price states as an inducement, "of course these both propertys goes to you and Charley if I should pass in before you do only I wish that Mary would be taken care of," etc. The ending was, "regards to all, Ed." This was not witnessed and the signing not attended with any ceremonies. It was held not entitled to probate.—*Estate of Branick*, 172 Cal. 482, 157 Pac. 238. A letter found in an envelope enclosed with a holographic will but bearing no express relation to it, except to state that the writer had made a will and made the addressee executor, and the words, "As this will cut out a great amount of the work contemplated by me, I direct, or think from the present outlook that you should be paid for your services as administrator \$50,000," is not admissible to probate as part of the will.—*In re Keith's Estate*, 173 Cal. 276, 159 Pac. 705.

14. **Nuncupative wills.**—The statute of the state of Washington, setting forth the essential conditions of the making of a nuncupative will, requires not only that the testator shall intend to make a will, but that he shall intend to make an oral will; hence, after a written will has been denied probate on account of defective attestation persons present at its signing can not prove its contents and have the same admitted to probate as a nuncupative will.—*Brown v. State*, 87 Wash. 44, Ann. Cas. 1917D, 604, 151 Pac. 81.

15. **Non-intervention wills.**—The statute of the state of Washington, relating to estates of decedents, provides what formal proceedings are necessary to prove and establish a will, notwithstanding the will is of the non-intervention sort.—*Paysse v. Paysse*, 86 Wash. 349, 150 Pac. 622.

16. **Spurious wills.**—An attempt in good faith to probate a later purported will, spurious in fact, but believed to be genuine by the party

seeking its probate, is not an "attempt to defeat" the provisions of a will, within the meaning of a forfeiture clause providing against such an attempt.—*In re Bergland's Estate* (Cal.), 5 A. L. R. 1363, 182 Pac. 277, 280. The bad faith of one who attempts to probate a spurious will is an essential element of the case of one who seeks to enforce a forfeiture against the person making such attempt to probate under a provision in a genuine will against an "attempt to defeat" its provisions, and the burden of proving bad faith is on him who seeks to declare the forfeiture.—*In re Bergland's Estate* (Cal.), 5 A. L. R. 1363, 182 Pac. 277, 280. The bad faith of one who withdraws a petition for the probate of a spurious will is not presumed in a proceeding to declare a forfeiture under a clause in a genuine will providing against an "attempt to defeat" its provisions from such withdrawal; nor even from the carrying of such petition to a hearing and adjudication that the will offered was not genuine.—*In re Bergland's Estate* (Cal.), 5 A. L. R. 1363, 182 Pac. 277, 280. Evidence that a petition to probate a will was withdrawn, and that a conviction was had against a person for the crime of forging it, is not competent evidence in a proceeding in probate to show that such will was spurious for the purpose of declaring a forfeiture under a prior will on the ground that a beneficiary had violated the conditions of a bequest to her by offering for probate a spurious will.—*In re Bergland's Estate* (Cal.), 5 A. L. R. 1363, 182 Pac. 277, 279. It is not necessary to carry an attempt to probate a spurious will to the point of a hearing and trial to constitute such attempt a contest or an attempt to defeat the testator's real intent within the meaning of a forfeiture clause providing against "an attempt to defeat" the provisions of the will, or an objection to the distribution made therein.—*In re Bergland's Estate* (Cal.), 5 A. L. R. 1363, 182 Pac. 277, 280.

17. *Limitations upon admission to probate.*—When the will of a husband which does not on its face purport to convey away from his wife more than one-half of his estate, comes on for probate, and the wife has not given her written consent thereto, the will must be admitted subject to her right of election, or as conveying only one-half of the estate, and can not be admitted in any other way.—*Hodgkins v. Ashby*, 56 Colo. 553, 139 Pac. 538, 541. A person who, after the offer of a will for probate has been enjoined by a decree in equity, becomes an assignee of an interest in the will, takes subject to the injunction.—*Estate of Chase*, 169 Cal. 625, 147 Pac. 461. The death of the husband gives the wife the right to one-half his estate, unless she makes her election to abide by a provision in his will to some other effect, and she is not limited in respect to the time for asserting his right, nor presumed to have consented to, by not opposing, probate.—*Hodgkins v. Ashby*, 56 Colo. 553, 556, 139 Pac. 538. If the effect of a married man's will is to reduce the one-half interest in his estate to which his wife's right extends, and the wife does not consent in writing, the court's jurisdiction to admit to probate is subject to the wife's right of election,

regardless of circumstances.—*Hodgkins v. Ashby*, 56 Colo. 553, 560, 139 Pac. 538. An implied election by a widow depends upon its being clear that in taking action she was fully aware of her rights, and that having that knowledge she intended to elect.—*Hodgkins v. Ashby*, 56 Colo. 553, 561, 139 Pac. 538.

18. *Collateral attack*.—A decree of a county court of Oregon of which a testatrix was at time of her death a resident, admitting her will to probate can not be collaterally attacked.—*Sappingfield v. Sappingfield*, 67 Or. 156, 135 Pac. 333, 334. The admission of a will to probate is a judicial act and, like other valid judgments, can not be collaterally impeached for any error or irregularity, but is binding until reversed or set aside according to law.—*In re Hayes's Estate*, 55 Colo. 340, Ann. Cas. 1914C, 531, 135 Pac. 449, 452. If the court, however, has once acquired jurisdiction of the property and of the parties by the giving of the statutory notice, a judgment or decree affecting either or both is not assailable collaterally by any one interested in the property, although he may at such proceeding have taken no part therein.—*Barrette v. Whitney*, 36 Utah 574, 37 L. R. A. (N. S.) 368, 106 Pac. 522, 526. A judgment, admitting an instrument to probate as being a will, which judgment has become final after appeal, can not be collaterally attacked on the ground that the instrument was not a will.—*Estate of Ryan*, 177 Cal. 598, 171 Pac. 297. A judgment admitting a will to probate can not, after becoming final, be successfully attacked through the introduction of evidence aliunde.—*Estate of Ryan*, 177 Cal. 598, 171 Pac. 297.

19. *Power to vacate order or decree*.—The general rule is that courts of probate have inherent power to set aside their own orders admitting wills to probate upon the discovery of a later and inconsistent will; and even a decree of distribution, although it has become final, does not prevent the probating of a subsequently discovered will.—*In re Moore's Estate* (Cal.), 182 Pac. 285, 288.

20. *Costs of probate*.—In a proceeding to probate a will, the costs are taxable against the estate, not against the person who had possession of the will, and who presented it for probate.—*Blackman v. Edsall*, 17 Colo. App. 429, 68 Pac. 790, 791. Any ordinary and reasonable expenses incurred by an executor in probating a will, even if contested, are expenses of administration, which are chargeable to the estate.—*Notley v. Brown*, 16 Haw. 575, 578. While section 1720 of the California Code of Civil Procedure gives to the court a discretionary power of allowing costs and expenses incurred upon the contest of a will and permits it to be exercised in favor of an unsuccessful proponent of a will, the power should be exercised only where such proponent has acted in good faith.—*Estate of Berthol*, 163 Cal. 343, 125 Pac. 750. When a will offered for probate is contested, the "benefit" derived therefrom inures to the successful claimants, which is the benefit contemplated by the rule making the expenses payable out of the estate as a benefit thereto.

—In re Statler's Estate, 58 Wash. 199, 108 Pac. 434. While section 1720 of the Code of Civil Procedure of California places the matter of allowing costs and expenses incurred upon the contest of a will within the discretionary power of the court, and permits it to be exercised in favor of an unsuccessful proponent of a will, still this discretionary power should be exercised in his favor only "as justice may require," where he has acted in good faith, and can be properly exercised only upon the final determination of the litigation.—Estate of Berthol (Mousnier v. Taylor), 163 Cal. 343, 125 Pac. 750. Under that section, the superior court sitting in probate may, in its discretion, allow costs and expenses to the proponent of a will failing of probate, "as justice may require," where he has acted in good faith, but such discretion can be exercised only upon the final determination of the litigation.—Estate of Berthol (Mousnier v. Taylor), 163 Cal. 343, 125 Pac. 750. An order of the court for the payment of expenses of a contest, if valid in other respects, can only be made payable in the due course of administration of the estate.—Estate of Yoell, 160 Cal. 741, 117 Pac. 1047. It is not within the scope of the powers of a special administrator to make such payment, and it is not within the scope of the power of the court to order any such payment by him out of the funds of the estate.—Estate of Yoell, 160 Cal. 741, 117 Pac. 1047. Until the will has been admitted to probate, or probate has been denied, the court has no power to appropriate the funds of the estate to aid either the proponent or the contestant.—Estate of Yoell, 160 Cal. 741, 117 Pac. 1047. Costs or expenses can only be allowed as incident to a judgment or final order of the court. It is only at the final determination of the litigation that the discretion of the court to award costs or expenses out of the estate can be properly exercised.—Estate of Yoell, 160 Cal. 741, 117 Pac. 1047. Reimbursement for expenses incurred in the effort to sustain a will procured by the fraud or undue influence of the person defending it against contest not only may, but should, in the exercise of a sound discretion, be denied.—Estate of Jones, 166 Cal. 147, 135 Pac. 293. There is no provision in the code of the state of Washington that the costs and expenses of an unsuccessful contest of the probate of a will shall be paid out of the estate and costs should not be allowed in such cases.—In re Enos' Estate, 79 Wash. 590, 140 Pac. 677, 680.

21. Appeal.

(1) In general.—Facts in the instant case examined and found to support the judgment of the trial court admitting the will to probate.—Dickey v. Dickey (Okla.), 168 Pac. 1018, 1020. The court considers the record of a proceeding for the probate of a will and approves the act of the trial court in admitting the instrument to probate as having been written and signed by the decedent, alleged to have been the testator.—Estate of Jepson, 178 Cal. 257, 172 Pac. 1107. On appeal from an order admitting a will to probate, if the record presents a question simply of a conflict of evidence, the determination of the court below

must be conclusive, since the weight of evidence is for the trial court and its determination is to be reviewed only where the evidence was obviously false or inherently improbable.—*Estate of Jepson*, 178 Cal. 257, 172 Pac. 1107, 1108. On an appeal from an order admitting a will to probate, a recital in the order of the giving of notice of the hearing of the petition for probate is sufficient to establish the truth of the fact recited, unless the record affirmatively shows that the recital is untrue.—*Estate of Dombrowski*, 163 Cal. 290, 125 Pac. 233. Mere physical weakness is not necessarily evidence that undue influence was exerted, but evidence of physical and mental weakness is always material upon the question of undue influence.—*Johnson v. Shaver* (S. D.), 172 N. W. 676, 678. A person, interested in a will and who, as being so, has been notified to appear at the probate, is entitled to appeal from the decree admitting the instrument to probate.—*Estate of Allen*, 176 Cal. 632, 169 Pac. 364.

REFERENCES.

Further proceedings of lower court are not affected by appeal.—See subd. 2 (1), *supra*, on jurisdiction of courts.

(2) *Parties*.—On appeal from the judgment denying the probate of a will, all adverse parties are necessary parties; and in case of the death of any of such parties pending the appeal, it will be dismissed for want of jurisdiction, unless there has been a proper revivor.—*Grayson v. Chisso*, 47 Okla. 713, 150 Pac. 697. Upon appeal to the supreme court from a judgment of the district court refusing to admit to probate a will, the executor or administrator with the will annexed, is the only necessary plaintiff in error.—*Bell v. Davis*, 43 Okla. 221, 229, Ann. Cas. 1917C, 1075, 142 Pac. 1011. Upon appeal to the district court from an order or judgment of a court of probate jurisdiction admitting a will to probate, the only necessary parties are the executor, or administrator with the will annexed, who was the petitioner or proponent of the will, and the contestants, who opposed its admission; and, they being parties, the judgment of the court admitting or rejecting the will has the same effect as if all persons interested in establishing the will had been made formal parties, and such judgment while it remains in force, subject to reversal on appeal by the supreme court, is conclusive upon the world.—*Bell v. Davis*, 43 Okla. 221, 229, Ann. Cas. 1917C, 1075, 142 Pac. 1011. Devisees in a will who are served with a notice of application to probate a will, who are not parties to the hearing of such application, and did not take part in the proceedings for probate in the county court, are not necessary parties on appeal to the supreme court, involving the probate of the will.—*Brock v. Keifer* (Okla.), 157 Pac. 88, 89.

(3) *Review of findings*.—A court of appeal jurisdiction will not assume the character of a handwriting expert in order to set aside the finding of a trial court.—*Estate of Jepson*, 178 Cal. 257, 172 Pac. 1107. A *prima facie* showing that the necessary conditions have been observed suffices, in ordinary cases, to entitle a will to probate; but when

rebutting testimony is offered so that a conflict arises the trial court's findings thereupon, if based on substantial testimony, will be sustained.—*McCarthy v. Weber*, 96 Kan. 415, 151 Pac. 1103. On appeal to the district court of Oklahoma from a judgment of the county court of that state refusing to admit a will to probate, the district may, in its discretion, submit the questions of undue influence and testamentary capacity to a jury; its findings, however, are not binding; they are advisory only.—*Bilby v. Stewart*, 55 Okla. 767, 153 Pac. 1173.

(4) *Reversal of judgment.*—An order allowing an unsuccessful proponent of a will his costs and expenses incurred in the contest, prior to the final determination thereof, is premature, and will be reversed without a consideration of the merits.—*Estate of Berthol (Mousnier v. Taylor)*, 163 Cal. 343, 125 Pac. 750. It is only after a final determination of the controversy respecting which the allowance is claimed that the court can properly determine whether it would be justified in making the allowance or not; an allowance made before such time, the action of the court will be reversed on appeal.—*Estate of Berthol (Mousnier v. Taylor)*, 163 Cal. 343, 125 Pac. 750, following *Estate of Yoell*, 160 Cal. 741, 117 Pac. 1047.

CHAPTER II.

CONTESTING PROBATE OF WILLS.

- § 985. Contestant to file grounds of contest, and petitioner to reply.
- § 986. Form. Opposition to probate of will and codicils, for unsoundness of mind, fraud, etc.
- § 987. Form. Contest, on various grounds, of probate of will.
- § 988. Form. Petition by public administrator, for letters of administration, and contest of probate of will.
- § 989. Form. Demurrer to contest of probate of will.
- § 990. Form. Answer to contest of probate of will.
- § 991. Form. Demand for jury on contest of probate of will.
- § 992. How jury obtained and trial had.
- § 993. Verdict of jury. Judgment.
- § 994. Examination of witnesses. Proof of handwriting.
- § 995. Testimony reduced to writing for future evidence.
- § 996. Certificate of proof of will.
- § 997. Form. Certificate of proof of will, and facts found. (Two witnesses.)
- § 998. Form. Certificate of rejection of will.
- § 999. Will and proof to be filed and recorded.
- § 1000. Form. Order admitting will to probate and for letters testamentary (with or without bond).
- § 1001. Form. Shorter order admitting will to probate and for letters testamentary (with or without bond).
- § 1002. Form. Order admitting will to probate and for letters of administration with the will annexed.

CONTEST OF PROBATE.

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|--------------------------------------|---|
| 1. In general. | (6) Same. What is not. |
| 2. Nature of proceeding. | (7) Fraud, etc. |
| 3. Forfeiture for contesting. | (8) Fraud and undue influence. |
| 4. Jurisdiction. | (9) Construction of statute. |
| (1) In general. | 8. Waiver of right to contest. |
| (2) Mandate to restore contest. | 9. Pleadings. |
| (3) Nonsuit. | (1) In general. |
| 5. Parties. | (2) Unsoundness of mind. |
| (1) In general. | (3) Undue influence. |
| (2) Who may not contest. | 10. Issues. Jury trial of. |
| (3) Duty of executor to defend. | 11. Burden of proof. |
| 6. Time of contest. In general. | (1) In general. |
| 7. Grounds of contest. | (2) As to mental incapacity and insanity. |
| (1) On grounds of invalid execution. | (3) As to undue influence. |
| (2) Insanity. | 12. Evidence generally. |
| (3) Undue influence. In general. | (1) Competency of witnesses, |
| (4) Same. Meaning of. | limitations, execution of |
| (5) Same. Avoidance of will. | will, etc. |

- (2) Communications with attorneys.
- (3) Declarations of legatees, etc.
- (4) Declarations of testator.
- (5) Jury as judges of weight of evidence.
- 13. Evidence as to mental condition, testamentary condition, etc.
 - (1) In general.
 - (2) Presumption.
 - (3) Manner of disposing of property.
 - (4) On issue of insanity.
 - (5) Insane delusions.
 - (6) Effect of suicide as evidence.
 - (7) Testimony of intimate acquaintances.
 - (8) Testimony of casual observers.
 - (9) Expert witnesses.
 - (10) Physician as witness.
 - (11) Non-experts.
 - (12) Wife's testimony as to husband.
- 14. Evidence as to undue influence.
 - (1) In general. Pleading.
 - (2) Presumption.
 - (3) Inferences.
 - (4) Direct testimony.
 - (5) Circumstantial evidence.
 - (6) Opportunity.
 - (7) Confidential relation.
 - (8) Privileged communications.
 - (9) Must show what.
- (10) Unnatural will.
- (11) Competent witnesses.
- (12) Competency of evidence.
- (13) Declarations of testator.
- (14) Fraud.
- (15) Sufficiency of evidence.
- (16) Insufficiency of evidence.
- 15. Instructions to jury.
- 16. Findings and verdict.
 - (1) Effect of findings.
 - (2) Directing a verdict.
 - (3) Mistrial.
 - (4) New trial.
- 17. Appeals.
 - (1) In general.
 - (2) Parties. Who entitled to appeal.
 - (3) Notice of appeal.
 - (4) Settlement of statement.
 - (5) Jurisdiction on appeal.
 - (6) Record.
 - (7) Time of appeal.
 - (8) Presumption on appeal.
 - (9) Consideration on appeal.
 - (10) Question that can not be first raised on appeal.
 - (11) Review of verdict or findings.
 - (12) Review of evidence.
 - (13) Harmless error.
 - (14) Direct and collateral attack.
 - (15) Effect of appeal as to executor's powers.
 - (16) Reversal.
- 18. No review in equity.

§ 985. Contestant to file grounds of contest, and petitioner to reply.

If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer provided for in part two, title six, chapter three of this code. If the demurrer is sustained, the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's

grounds, traversing, or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving:

1. The competency of the decedent to make a last will and testament;
2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence;
3. The due execution and attestation of the will by the decedent or subscribing witnesses; or,
4. Any other questions substantially affecting the validity of the will, must, on request of either party in writing (filed three days prior to the day set for the hearing), be tried by a jury. If no jury is demanded, the court must try and determine the issues joined. On the trial, the contestant is plaintiff and the petitioner is defendant.—*Kerr's Cyc. Code Civ. Proc.*, § 1312.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona*—Revised Statutes of 1913, paragraph 748.
 Colorado—Mills's Statutes of 1912, sections 7884, 7898.
 Idaho*—Compiled Statutes of 1919, section 7452.
 Kansas—General Statutes of 1915, section 11775.
 Montana*—Revised Codes of 1907, section 7397.
 Nevada—Revised Laws of 1912, section 5874.
 North Dakota—Compiled Laws of 1913, section 8641.
 Oklahoma—Revised Laws of 1910, section 6210.
 South Dakota—Compiled Laws of 1913, section 5671.
 Utah—Compiled Laws of 1907, section 3791.
 Wyoming—Compiled Statutes of 1910, section 5440.

§ 986. Form. Opposition to probate of will and codicils for unsoundness of mind, fraud, etc.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
 [Title of form.]

That the deceased, at the date of the making of said pretended will, and at the dates of the making of the alleged codicils thereto, was incompetent to make said or any will, or to make either or any of the alleged codicils;

That said pretended will is not the will of said deceased;

That at the time of the alleged signing of said pretended will, and of the several alleged codicils thereto, said deceased was laboring under, and had, an insane delusion as to said contestant;

That at the time of the alleged signing of said pretended will, and of the said several alleged codicils thereto, said deceased, —, was not of sound and disposing mind;

That at the time of the alleged signing of said pretended will, and of the said several alleged and pretended codicils thereto, said deceased was, and had been, habitually intemperate from the excessive use of intoxicating liquors, and was thereby, and by reason thereof, incapacitated from executing said pretended will, or either or any of the said alleged codicils thereto;

That said deceased, at the time of the signing of the said alleged and pretended will, and of the said several alleged codicils thereto, was laboring under insane delusions, by reason of habitual intoxication, produced by the excessive use of intoxicating wines and other liquors;

That said pretended will and the several alleged codicils thereto are, and each of them is, void;

That said pretended will and the said several alleged codicils thereto were not, nor has any or either of them ever been signed by said deceased at a time when he was of sound and disposing mind;

That at the time of the alleged signing of said pretended will, and of the said several codicils thereto, by said deceased, he was under undue influence, and was prejudiced against said contestant;²

That said pretended will, and the said several pretended codicils thereto are, and each of them is, void, because the pretended bequests therein mentioned are not certain, either as to the objects or definiteness of amount,

but are discretionary and not susceptible of enforcement;

That said pretended will and the said several alleged codicils thereto are, and each of them is, uncertain and indefinite as to the powers and duties of the several trustees therein named;

That the duties and powers of the persons named in said pretended will, and of the said several alleged codicils thereto, are too indefinite and uncertain to authorize their enforcement by any court;

That the said instrument in writing was obtained, and the execution thereof procured, by fraud and circumvention and undue influence practiced upon the decedent by — and —, or one of them, in this, namely, —;³

That said instrument in writing was not freely and voluntarily executed or made as the last will of said decedent, but that the subscription thereto, and publication thereof, by him, the said decedent, were procured by fraud and coercion exercised upon him by — and —, or one of them, in this, namely, —.⁴

—, Contestant.

Explanatory notes.—1 Give file number. 2 State the facts relied on as constituting undue influence, prejudice, etc. 3, 4 State facts constituting the alleged fraud, undue influence, coercion, etc.

§ 987. Form. Contest, on various grounds, of probate of will.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

Now comes —, and files this, his contest² of and objections to the admission to probate of the instrument filed herein on the — day of —, 19—, purporting to be the last will, and codicil thereto, of the above-named decedent, and for grounds of contest and objection to the admission to probate of said instrument avers as follows, to wit:

First Ground of Contest.³

I.

That the said —, said decedent, left surviving him,

his widow, to wit, —, and five children, to wit, —, who is this contestant, —, —, ⁴ formerly —, —, and —, all of whom are of full and lawful age, and reside in said county ⁵ of —.

II.

That this contestant, —, is a son of said decedent and one of his heirs at law, and entitled to share in the distribution of his estate if said — died intestate.

III.

That at the time when the said —, in form executed the said purported and pretended will and codicil thereto, he, the said —, now deceased, was not of sound mind.

Second Ground of Contest.⁶

I.

(Repeat allegations of first paragraph in the first ground of contest.)

II.

(Repeat allegations of second paragraph in the first ground of contest.)

III.

That this contestant is informed and believes, and upon such information and belief avers, that the said instruments purporting to be the will of said deceased and his codicil thereto, were not, nor was either of them, executed in the manner or form required by law in this:

That the said purported will was not signed by the said — in the presence of — and —, whose names purport to be signed as witnesses thereto, nor either of them, and that the names of the said purported witnesses to said will were not signed nor was either of them signed thereto by the said witnesses respectively at the request of the said —, or in his presence, nor did the said — declare the same to be his will in the presence of said witnesses, or either of them;

That the said purported codicil was not signed by the said — in the presence of — and —, whose names

purport to be signed as witnesses thereto, or of either of them, and that the names of the said — and — were not subscribed thereto by them respectively, or by either of them, at the request of the said —, or in his presence, nor did he declare said purported codicil to be the codicil to said will in the presence of said witnesses, or either of them.

Third Ground of Contest.⁷

I.

(Repeat allegations of first paragraph in the first cause of action.)

II.

(Repeat allegations of second paragraph in the first cause of action.)

III.

That the execution in form of said alleged will and codicil, if the same were executed by the said — at all, was procured by the undue influence of his wife, the said —, and that the facts constituting such undue influence are as follows:

That for a long time, to wit, about — years prior to his death, the said — was and thereafter, and until the time of his death, continued to be, afflicted with disease of both body and mind, and by reason thereof he became and was weak and ill both in body and mind, and his mind was so weakened that he became childish and was unable at times to talk or to knowingly understand the ordinary affairs of life, or to understand or to transact business;

That while the said — was in such condition of body and mind he was incapable of properly taking care of himself and was in constant need of the care and attention of some other person to see that his wants were properly administered to, and during all of said period he resided with, and was taken care of by, his said wife, —, at their home in the county of —, state of —,

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~~CONFIDENTIAL~~

WILLS.

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said purported will, and at and many times before the
time of the formal execution of said purported codicil,
did state to the said — that his children were spend-
thrifths, and would not and could not preserve or take
care of any property which they might receive from his
estate at his death, and that his said children had no
filial affection for him, and were anxiously awaiting his
death to obtain his property and squander the same, and
did demand of the said — that he should will and devise
all of his property to her, the said —, and did threaten
him that if he did not will and devise all of his property

to her, the said —, she would cause him great trouble in his lifetime, and would cause him to be adjudged an incompetent person and cause a guardian to be appointed for his person and estate, and that a large part of his entire estate would be dissipated in litigation;

That by means of the said statements, threats, and demands of the said —, hereinbefore alleged, she, the said —, did so prevail upon and influence the said —, in his then weakened condition of mind and body, both at a time of the alleged execution of said purported will and at the time of the alleged execution of said purported codicil thereto, that the said — did, against his will and wish, in form execute the said purported will and the said purported codicil thereto;

That all of the said statements so made by said — to said — were untrue and were known by her at the time they were made to be untrue, and the same were made by her for the purpose of prejudicing, and did prejudice the said — against his said children;

That the said —, by reason of his condition of mind and body as aforesaid, at the time of the said formal execution of said purported will, and at the time of the said formal execution of said purported codicil thereto, was unable to resist the said undue influence of the said — hereinbefore alleged, and being then and there under the domination and control of the said —, as aforesaid, and by reason of the said undue influence of the said —, hereinbefore alleged, as aforesaid, did in form make and execute the said alleged will and the said alleged codicil, if the same were ever or at all made or executed by him;

That if the said — had been free from the said undue influence of the said — hereinbefore alleged, he would not in form, or in any wise, have made or executed the said alleged will, or the said alleged codicil thereto.

Fourth Ground of Contest.⁸

I.

(Repeat allegations of first paragraph in the first cause of action.)

II.

(Repeat allegations of second paragraph in the first cause of action.)

III.

That this contestant is informed and believes, and upon such information and belief alleges, that the execution in form of said alleged will and codicil, if the same were executed by the said — at all, was procured by and through the fraud of his said wife, —, and that the facts constituting such fraud are as follows:

That at and before the time of the formal execution of said purported will by the said —, if the same was executed, and at and before the time of the formal execution of said purported codicil by the said —, if the same was executed, the said —, with intent to deceive the said —, and to induce him to execute the said purported will and codicil, promised to the said —, that if he, the said —, would will and devise all of his property to her, the said —, with the exception of a nominal sum to each of his said children as in said purported will provided, she, the said —, could and would, after his death, divide all the property so willed and devised to her, equally and proportionately among all of his said children and herself according to the laws of inheritance of the state of —;

That the said —, believed and relied upon the said promise, and was by said promise induced to execute the said purported will and codicil, if the same were in fact executed; that the said — would not, in form, nor at all, have executed the said purported will or codicil if the said promise had not been made; and that the said promise upon the part of the said — was made by her

without any intention on her part of ever performing it.

Wherefore the said —, ⁹ prays that the said instrument purporting to be the will and codicil thereto of the said —, deceased, be refused and denied probate, and that he have such other and further relief as he may be entitled to.

— and —, Attorneys for the Contestant, —.

[Add usual verification.]

Explanatory notes.—1 Give file number. 2 In case an amended contest is filed, say: Now comes —, and, by leave of court first had and obtained, files this first amended contest, etc. 3 Unsoundness of mind. 4 Where female children have married, give both family and married names. 5 Or, city and county. 6 Non-execution of will. 7 Undue influence of wife. 8 Fraud of wife. 9 Contestant.

§ 288. Form. Petition by public administrator for letters of administration, and contest of probate of will.

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

To the Honorable the — ² Court of the County ³ of —, State of —.

The petition of —, of the county ⁴ of —, state of —, respectfully shows:

That — died on or about the — day of —, 19—, at —;⁵

That said deceased at the time of his death was a resident of the county ⁶ of —, state of —, and left property in the said county ⁷ of —, state of —, of the probable value of — dollars (\$—), but the character of which your petitioner is not able at this time to give;

That the names, ages, and residences of the heirs of said decedent, so far as known to your petitioner are as follows, to wit,—

Names.	Approximate ages.	Residences.
—	—	—
—	—	—

That no administrator has been appointed to take

charge of said estate, and that in consequence thereof, it is being wasted, uncared for, and lost;

That your petitioner is the public administrator of the said county ⁸ of —, state of —, and, as such, is entitled to letters of administration upon the estate of said deceased, and prays for issuance of the same to him.

And, in opposition to the petition for the probate of a certain instrument in writing, filed in said court on the — day of —, 19—, and which purports to be the last will of —, the said deceased, your petitioner alleges:

That said written instrument is not the will of said —;

That it was not signed by the said —, or by anyone authorized to sign it for him, the said —; and

That, at the time said purported will is alleged to have been signed, the pretended testator was not of sound and disposing mind,⁹ and had no power to make a will.

—, Attorney for Petitioner. —, Petitioner.

Explanatory notes.—1 Give file number. 2 Title of court. 3 Or, City and County. 4 Or, city and county. 5 State place. 6-8 Or, city and county. 9 Or, was dead.

§ 969. Form. Demurrer to contest of probate of will.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

Now comes —, the petitioner for the probate of the last will of —, deceased, and for the issuance to him of letters testamentary thereon, and for demurrer to the contest of —, filed herein by —, the public administrator, opposing the probate of said last will alleges:

That said contestant is not a devisee, legatee, heir at law, or other person interested in said estate, and therefore has not legal capacity to contest the probate of said will;

That the said contest so filed herein as aforesaid does

not state facts sufficient to constitute a ground of opposition to said will.

Wherefore proponent prays that said contest be dismissed. —, Attorney for Proponent.

Explanatory note.—1 Give file number.

§ 990. Form. Answer to contest of probate of will.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

For answer to the contest of the probate of the last will of —, deceased, filed herein by —, the proponent of said will, —, now comes, and denies and avers as follows: —.2

Wherefore proponent prays that said contest be dismissed; that said instrument be admitted to probate as the last will of —, deceased; and that proponent herein recover his costs. —, Attorney for Proponent.

Explanatory notes.—1 Give file number. 2 Make denials and averments as in ordinary civil actions.

§ 991. Form. Demand for jury on contest of probate of will.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

—, the contestant² in the above-entitled matter demands that the issues herein arising upon the petition of —, contesting the probate of the last will of said —, deceased, and the answer to said petition, be tried by a jury.

Dated —, 19—. —, Attorney for Contestant.³

Explanatory notes.—1 Give file number. 2, 3 Or, petitioner for probate.

§ 992. How jury is obtained and trial had.

When a jury is demanded, the superior court must impanel a jury to try the case, in the manner provided for impaneling trial juries in courts of record, and the trial must be conducted in accordance with the provi-

sions of part two, title eight, chapter four, of this code. A trial by the court must be conducted as provided in part two, title eight, chapter five of this code.—*Kerr's Cyc. Code Civ. Proc.*, § 1313.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 749.

Colorado—Mills's Statutes of 1912, section 7884.

Idaho—Compiled Statutes of 1919, section 7453.

Montana*—Revised Codes of 1907, section 7398.

South Dakota—Compiled Laws of 1913, section 5672.

§ 993. Verdict of the jury. Judgment.

The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court, upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must be reduced to writing. If the will is admitted to probate, the judgment, will, and proofs must be recorded.—*Kerr's Cyc. Code Civ. Proc.*, § 1314.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 750.

Colorado—Mills's Statutes of 1912, section 7888.

Idaho*—Compiled Statutes of 1919, section 7454.

Montana*—Revised Codes of 1907, section 7399.

Oklahoma—Revised Laws of 1910, section 6211.

South Dakota—Compiled Laws of 1913, section 5672.

Wyoming—Compiled Statutes of 1910, section 5441.

§ 994. Examination of witnesses. Proof of handwriting.

If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined; and the death, absence, or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit the testimony of other wit-

nesses to prove the sanity of the testator and the execution of the will; and, as evidence of the execution, it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them.—*Kerr's Cyc. Code Civ. Proc.*, § 1315.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona*—Revised Statutes of 1913, paragraph 751.
- Colorado—Mills's Statutes of 1912, sections 7886, 7891.
- Idaho*—Compiled Statutes of 1919, section 7455.
- Kansas—General Statutes of 1915, sections 11763, 11764, 11765, 11767, 11769.
- Montana*—Revised Codes of 1907, section 7400.
- Nevada—Revised Laws of 1912, section 5875.
- New Mexico—Statutes of 1915, section 5878.
- North Dakota—Compiled Laws of 1913, section 8641.
- Oklahoma*—Revised Laws of 1910, section 6212.
- South Dakota*—Compiled Laws of 1913, section 5673; as amended by Laws of 1916-17, chapter 186, page 244.
- Utah—Compiled Laws of 1907, section 3792.
- Wyoming*—Compiled Statutes of 1910, section 5442.

§ 995. Testimony reduced to writing for future evidence.

The testimony of each witness, reduced to writing and signed by him, shall be good evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from the state.—*Kerr's Cyc. Code Civ. Proc.*, § 1316.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona*—Revised Statutes of 1913, paragraph 752.
- Colorado—Mills's Statutes of 1912, section 7888.
- Idaho*—Compiled Statutes of 1919, section 7456.
- Kansas—General Statutes of 1915, section 11777.
- Montana*—Revised Codes of 1907, section 7401.
- New Mexico—Statutes of 1915, section 5878.
- North Dakota—Compiled Laws of 1913, section 8641.
- Oklahoma—Revised Laws of 1910, section 6213.
- South Dakota*—Compiled Laws of 1913, section 5674.
- Utah*—Compiled Laws of 1907, section 3793.
- Wyoming—Compiled Statutes of 1910, section 5443.

§ 996. Certificate of proof of will.

If the court is satisfied, upon the proof taken, or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, a certificate of the proof and the facts found, signed by the judge, and attested by the seal of the court, must be attached to the will.—*Kerr's Cyc. Code Civ. Proc.*, § 1317.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 753.

Colorado—Mills's Statutes of 1912, section 7886.

Idaho*—Compiled Statutes of 1919, section 7457.

Montana*—Revised Codes of 1907, section 7402.

Nevada—Revised Laws of 1912, section 5876.

New Mexico—Statutes of 1915, sections 5879, 5888.

North Dakota—Compiled Laws of 1913, sections 8641, 8646.

Oklahoma*—Revised Laws of 1910, section 6214.

South Dakota—Compiled Laws of 1913, section 5675.

Utah*—Compiled Laws of 1907, section 3794.

Wyoming—Compiled Statutes of 1910, section 5444.

§ 997. Form. Certificate of proof of will, and facts found.
(Two witnesses.)

[Title of court.]

[Title of estate.]

{ No. ——.¹ Dept. No. ——. }
 [Title of form.]

State of —, }
 County ² of —, } ss.

I, —, Judge of the —³ Court of said County,⁴ do hereby certify:

That on the — day of —, 19—, the annexed instrument was admitted to probate as the last will of —, deceased; that the testimony taken on the probate of said will, reduced to writing and signed by the witnesses respectively, is filed in this court, and from the proofs taken and the examinations had therein, the said court finds as follows:

That said — died on or about the — day of —,

19—, in the county ⁵ of —, state of —; that at the time of his death he was a resident of the said county ⁶ of —, state of —; that the said annexed will was duly executed by the said decedent in his lifetime, in the county ⁷ of —, state of —, and signed by the testator in the presence of — and —, the subscribing witnesses thereto; that he acknowledged the execution of the same in their presence, and declared the same to be his last will; that the said witnesses attested the same at his request, and in his presence, and in the presence of each other; and that the said decedent, at the time of executing said will, was of the age of eighteen years and upwards, was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, and was not, in any respect, incompetent to devise and bequeath his estate.

In witness whereof, I have signed this certificate and caused the same to be attested by the clerk of said court, under the seal thereof, this — day of —, 19—.

—, Judge.

[Seal]

Attest: —, Clerk of the — Court.

By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2 Or, City and County.
3 Title of court. 4-7 Or, city and county.

§ 998. Form. Certificate of rejection of will.

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.
[Title of form.]

State of —,
County ² of —, } ss.

I, —, Judge of the — Court of the County ³ of —, State of —, do hereby certify:

That on the — day of —, 19—, the annexed instrument was filed in said court, together with the petition of —, praying that it be admitted to probate as the last will of deceased; that the matter has come regularly on

this — day of —, 19—, for hearing; that, after considering the proofs taken and examinations made therein, the court finds that said instrument is not the last will of —, deceased; and orders that said instrument be rejected and not be admitted to probate.

In witness whereof, I have signed this certificate and caused the same to be attested by the clerk of this court, under the seal thereof this — day of —, 19—.

—, Judge.

[Seal] Attest: —, Clerk of the — Court.

By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2 Or, City and County. 3 Or, city and county.

§ 999. Will and proof to be filed and recorded.

The will, and a certificate of the proof thereof, must be filed and recorded by the clerk, and the same, when so filed and recorded, shall constitute part of the record in the cause or proceeding. All testimony shall be filed by the clerk.—*Kerr's Cyc. Code Civ. Proc.*, § 1318.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 754.

Colorado—Mills's Statutes of 1912, sections 7879, 8052.

Idaho—Compiled Statutes of 1919, section 7458.

Kansas—General Statutes of 1915, section 11771.

Montana*—Revised Codes of 1907, section 7403.

New Mexico—Statutes of 1915, sections 5891, 5892.

North Dakota—Compiled Laws of 1913, sections 8641, 8648.

Oklahoma—Revised Laws of 1910, section 6215.

South Dakota—Compiled Laws of 1913, section 5676.

Utah*—Compiled Laws of 1907, section 3795.

Washington—Laws of 1917, chapter 156, page 646, section 13.

§ 1000. Form. Order admitting will to probate and for letters testamentary (with or without bond).

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

The petition of —, heretofore filed, praying for the admission to probate of a certain instrument in writing

filed in this court, purporting to be the last will of —, deceased, and that letters testamentary be issued to said petitioner, this day coming on regularly to be heard; and it being proved, to the satisfaction of this court, that notice has been given, as required by law, to all persons interested, of the time appointed for proving said will, and for hearing said petition, the court proceeds to examine said petitioner, and — and —, the subscribing witnesses to said will, produced in behalf of said petitioner, whose testimony has been reduced to writing and filed; and from which testimony it appears that said instrument in writing is the last will of said —, deceased; that it was executed in all particulars as required by law; that said testator, at the time of the execution of the same, was of sound and disposing mind, and not under duress, menace, fraud, or undue influence; that said — died on or about the — day of —, 19—, being a resident of the county² of —, state of —, at the time of his death, and leaving real and personal estate in said state; the personal estate being of the value of — dollars (\$—), or thereabouts; and that the said estate and effects, for and in respect to which the probate of said will is applied for as aforesaid, do not exceed the value of — dollars (\$—); and no objections being made or filed, and said applicant being competent to act as executor of said estate,—

It is ordered, That the said instrument in writing heretofore filed, purporting to be the last will of said —, deceased, be admitted to probate as the last will of said —, deceased; that said — be, and he is hereby, appointed as executor of said estate; and that letters testamentary issue to said petitioner upon his taking the oath as required by law,³ and giving the bond required by law for the faithful execution of the duties of his trust as such executor in the sum of — dollars (\$—),

with sufficient sureties, to be approved by the judge of this court.

Done in open court this — day of —, 19—.
—, Judge of the — Court.

Explanatory notes.—1 Give file number. 2 Or, City and County. 3 If no bond is required omit the following clause which relates to it.

§1001. Form. Shorter order admitting will to probate and for letters testamentary (with or without bond).

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

Now comes the petitioner, —, by —, his attorney, and proves to the satisfaction of the court that the time for hearing the petition for the probate of the will filed on the — day of —, 19—, and for letters testamentary thereon, was by the clerk duly set for the — day of —, 19—; and that notice of said hearing has been duly given as required by law; and the matter now coming regularly on for hearing,² and no person appearing to contest the said petition, the court proceeds to hear the evidence and thereupon finds that said — died on the — day of —, 19—, leaving estate in —;³ that he was then a resident of the county ⁴ of —, state of —; that the other facts alleged in said petition are true; and that said petition ought to be granted.

It is therefore ordered and adjudged, That the written instrument heretofore filed, purporting to be the last will of said deceased, and so alleged to be in said petition, be admitted to probate as the last will of —, deceased; that — be appointed executor of the said last will of said deceased; and that letters testamentary issue to said — upon his taking the oath required by law,⁵ without any bond being required. —, County Clerk.

Entered ⁶ —, 19—. By —, Deputy.

Explanatory notes.—1 Give file number. 2 If the matter has been continued, say: "and the hearing having been regularly continued to

this time." ³ Name of state. ⁴ Or, city and county. ⁵ If bonds are not waived, say: "and giving bond in the sum of — dollars (\$—)." ⁶ Orders or decrees need not be signed. See § 77, ante.

§ 1002. Form. Order admitting will to probate and for letters of administration with the will annexed.

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

Now comes the petitioner, —, by —, his attorney, and proves to the satisfaction of the court that the time for hearing the petition for the probate of the will herein filed on —, 19—, and for letters of administration, with the will annexed, was by the clerk duly set for the — day of —, 19—, and that notice of said hearing has been duly given as required by law,² and no person appearing to contest said petition, the court proceeds to hear the evidence, and thereupon finds that the facts alleged therein are true and that said petition ought to be granted.

It is therefore adjudged and determined by the court, That said — died on the — day of —, 19—, leaving estate in the state of —; that he was then a resident of the county ³ of —, in said state; that the instrument in writing hereinbefore filed purporting to be his last will, and so alleged to be in said petition, be admitted to probate as the last will of said deceased;

And it is ordered, That — be appointed administrator of said estate with the will annexed; and that letters of administration with the will annexed issue to him upon his taking the oath required by law and giving bond in the sum of — dollars (\$—). —, County Clerk.

Entered ⁴ —, 19—.

By —, Deputy.

Explanatory notes.—¹ Give file number. ² If the matter has been continued, say: "and the hearing having been regularly continued by the court to this time." ³ Or, city and county. ⁴ Orders and decrees need not be signed. See § 77, ante.

CONTEST OF PROBATE.

1. In general.
2. Nature of proceeding.
3. Forfeiture for contesting.
4. Jurisdiction.
 - (1) In general.
 - (2) Mandate to restore contest.
 - (3) Nonsuit.
5. Parties.
 - (1) In general.
 - (2) Who may not contest.
 - (3) Duty of executor to defend.
6. Time of contest. In general.
7. Grounds of contest.
 - (1) On grounds of invalid execution.
 - (2) Insanity.
 - (3) Undue influence. In general.
 - (4) Same. Meaning of.
 - (5) Same. Avoidance of will.
 - (6) Same. What is not.
 - (7) Fraud, etc.
 - (8) Fraud and undue influence.
 - (9) Construction of statute.
8. Waiver of right to contest.
9. Pleadings.
 - (1) In general.
 - (2) Unsoundness of mind.
 - (3) Undue influence.
10. Issues. Jury trial of.
11. Burden of proof.
 - (1) In general.
 - (2) As to mental incapacity and insanity.
 - (3) As to undue influence.
12. Evidence generally.
 - (1) Competency of witnesses, limitations, execution of will, etc.
 - (2) Communications with attorneys.
 - (3) Declarations of legatees, etc.
 - (4) Declarations of testator.
 - (5) Jury as judges of weight of evidence.
13. Evidence as to mental condition, testamentary condition, etc.
 - (1) In general.
 - (2) Presumption.
 - (3) Manner of disposing of property.
 - (4) On issue of insanity.
 - (5) Insane delusions.
 - (6) Effect of suicide as evidence.
- (7) Testimony of intimate acquaintances.
- (8) Testimony of casual observers.
- (9) Expert witnesses.
- (10) Physician as witness.
- (11) Non-experts.
- (12) Wife's testimony as to husband.
14. Evidence as to undue influence.
 - (1) In general. Pleading.
 - (2) Presumption.
 - (3) Inferences.
 - (4) Direct testimony.
 - (5) Circumstantial evidence.
 - (6) Opportunity.
 - (7) Confidential relation.
 - (8) Privileged communications.
 - (9) Must show what.
 - (10) Unnatural will.
 - (11) Competent witnesses.
 - (12) Competency of evidence.
 - (13) Declarations of testator.
 - (14) Fraud.
 - (15) Sufficiency of evidence.
 - (16) Insufficiency of evidence.
15. Instructions to jury.
16. Findings and verdict.
 - (1) Effect of findings.
 - (2) Directing a verdict.
 - (3) Mistrial.
 - (4) New trial.
17. Appeals.
 - (1) In general.
 - (2) Parties. Who entitled to appeal.
 - (3) Notice of appeal.
 - (4) Settlement of statement.
 - (5) Jurisdiction on appeal.
 - (6) Record.
 - (7) Time of appeal.
 - (8) Presumption on appeal.
 - (9) Consideration on appeal.
 - (10) Question that can not be first raised on appeal.
 - (11) Review of verdict or findings.
 - (12) Review of evidence.
 - (13) Harmless error.
 - (14) Direct and collateral attack.
 - (15) Effect of appeal as to executor's powers.
 - (16) Reversal.
18. No review in equity.

1. In general.—If a person is known to have made a will, and after his death it can not be found or accounted for, it is to be presumed

that he destroyed it for the purpose of revoking it.—*In re Frandsen's Will*, 50 Utah 156, 167 Pac. 362. But, if one makes a will and thereafter loses his mind, a valid revocation by him becomes impossible.—*In re Frandsen's Will*, 50 Utah 156, 167 Pac. 362. In the absence of incapacity, a will is not contestable merely because its provisions are unreasonable, unnatural, foolish, or unjust.—*In re Higgins's Estate*, 156 Cal. 257, 104 Pac. 6. In a contest over the probate of a will, its construction is not before the court and can not be determined.—*Bell v. Davis* (Okla.), 155 Pac. 1132, 1135.

2. Nature of proceeding.—A contest of the probate of a will is not a suit or action, either in law or equity, such as to entitle the contestant, as a matter of right, to have the issue as to whether or not the writing was a will, submitted to and tried by a jury. It is a special proceeding,—a proceeding in rem.—*Clough v. Clough*, 10 Colo. App. 433, 51 Pac. 513, 515. Under the provisions of the Kansas statute, a contest of the probate of a will has always been considered a formal proceeding by a civil action, in which the issues are defined by formal pleadings, and the rules of evidence, for and against the issues, established by repeated rulings. Either party may demand a jury.—*Wright v. Young*, 75 Kan. 287, 89 Pac. 694, 696. Upon the consent of a will, or of its probate, the question whether the property has escheated, or will escheat, or the question whether the property or its proceeds should be deposited in the state treasury for the benefit of non-resident alien heirs, can not be considered or adjudicated. The office of the contest is to attack the validity of the purported will alone.—*State v. District Court*, 25 Mont. 355, 65 Pac. 120, 122.

REFERENCES.

Validity of contract not to contest probate of will.—See note 13 L. R. A. (N. S.) 484-488.

3. Forfeiture for contesting.—A provision in a will whereby any beneficiary under its terms is to forfeit, by contesting or attempting to contest, the allowance made him or her under its terms, does not apply to efforts by a non-resident beneficiary to have the estate administered in the state of that residence rather than in California.—*Estate of Hill*, 176 Cal. 619, 169 Pac. 371.

4. Jurisdiction.

(1) In general.—The probate court, having express power to entertain a contest of the probate of a will, has power, incidentally, to decide any question which properly arises upon such contest, and, necessarily, upon consent of all the parties interested, to enter a decree affirming and adopting a compromise of such a contest, and ascertaining the shares to which the parties are respectively entitled.—*In re Davis' Estate*, 27 Mont. 490, 71 Pac. 757, 759; *State v. District Court*, 34 Mont. 345, 86 Pac. 268. The superior court, being vested with general jurisdiction in probate, has, upon the presentation of a

will, accompanied by a proper petition for the probate thereof, and the appearance of qualified persons to contest the same, the power to proceed and to entertain such contest, and under section 1306 of the Code of Civil Procedure of California, the question whether all of the interested parties have appeared is, so far as those actually present are concerned, one which the court is required to decide, not before exercising jurisdiction, but in the exercise of the jurisdiction conferred by the appearance of those present, and therefore error in that regard, if any be committed, is not jurisdictional, but is an irregularity in procedure subject to review only on appeal or by motion in the proceeding itself; and a final judgment in such contest, adverse to the contestants, constitutes a valid estoppel against them.—*Stead v. Curtis*, 205 Fed. 439, 123 C. C. A. 507. Wills are effective only as made so by statute, and the legislature has provided fully for the contest of them; the courts have no powers in this connection except statutory ones.—*Pond v. Faust*, 90 Wash. 117, Ann. Cas. 1918A, 736, 155 Pac. 776. A county court in Oklahoma, co-extensive with the county, is a court of original jurisdiction in all probate matters.—*Scott v. McGirth*, 41 Okla. 520, 139 Pac. 519.

REFERENCES.

Aversion to relatives as a test of mental incapacity.—See note 117 Am. St. Rep. 582.

(2) Mandate to restore contest.—A peremptory writ of mandate will be granted commanding the trial court, under circumstances where no other adequate or speedy remedy is open, to restore a contest of the probate of a will to its files, and to proceed therewith in the due exercise of its jurisdiction.—*Raleigh v. District Court*, 24 Mont. 306, 81 Am. St. Rep. 431, 61 Pac. 991, 994. Only final judgments can be pleaded or proved as *res adjudicata*; and a judgment, entered upon an order granting a nonsuit of a contest of a will does not become final while an appeal therefrom is pending, or until the time to appeal therefrom has expired.—*Estate of Ricks*, 160 Cal. 468, 117 Pac. 539.

5. Parties.

(1) In general.—The right of heirs to appear in a contest of the probate of a will can not be affected in any way by the will itself, which, as to heirs as contestants, can become operative only upon the determination of the contest.—*Estate of Wickersham*, 138 Cal. 355, 70 Pac. 1076, 1077. At or before the hearing of petitions and contests for the probate of wills and other proceedings, where all the parties interested in the estate are required to be notified thereof, the court may, in its discretion, appoint some competent attorney to represent, in all such proceedings, the devisees, legatees, heirs, or creditors of the decedent, who are minors, and have no general guardian in the county, or who are non-residents of the territory; and those interested, who, though they are neither such minors, nor non-residents, are unrepresented. Where the statute so provides, it is likewise discre-

tionary with the court whether an attorney so appointed shall receive a fee for the services which he renders under the appointment, to be paid out of the estate.—*In re Roarke's Estate*, 8 Ariz. 16, 68 Pac. 527, 528. Heirs have legal right to contest ancestor's will.—*Ruth v. Krone*, 10 Cal. App. 770, 103 Pac. 960. Where one would have inherited property but for the existence of a will his heirs at law have such an interest in the will as to enable them to maintain a contest thereof.—*Ingersoll v. Gourley*, 72 Wash. 462, 130 Pac. 744. If an intestate would have inherited a testatrix's property but for her will and if that intestate was so far insane as to be incapable of managing his own affairs from a time preceding the testatrix's death until his own death subsequent to hers, the heirs at law of the intestate have such an interest in the testatrix's will as to entitle them to maintain a contest thereof.—*In re Siebs' Estate*, 70 Wash. 374, Ann. Cas. 1913E, 125, 126 Pac. 913. Legatee under prior will may contest later will excluding him, regardless of tenable grounds, though he is stranger to testator's blood, and though prior will has not been offered for probate.—*Ruth v. Krone*, 10 Cal. App. 770, 103 Pac. 960. A person having such a pecuniary interest in the devolution of the testator's estate as will be impaired or defeated by the probate of a will or be benefited by setting it aside, is "a person interested" who may contest its probate.—*Estate of Land*, 166 Cal. 538, 137 Pac. 246. Where the interest of a person seeking to contest a will is not established by the pleadings, the trial court has the power to require the contestant to establish his interest before proceeding with the trial of the issues involving the validity of the will.—*Estate of Land*, 166 Cal. 538, 137 Pac. 246.

REFERENCES.

Persons who may appear and contest a will at the hearing for probate.—See notes 130 Am. St. Rep. 186, Kerr's Cal. Cyc. Code Civ. Proc., § 1307. Contest of probate of will by the state.—See note 2 L. R. A. (N. S.) 643, 644, 82 Pac. 672. Acceptance of benefit under will as affecting right to attack its validity.—See notes 3 Am. & Eng. Ann. Cas. 525, 9 Am. & Eng. Ann. Cas. 956.

(2) Who may not contest.—A person not directly or pecuniarily interested in the estate of a deceased person, at the time of the probate of the testator's will, is not entitled to contest the validity of the same. Hence the interest of a divorced husband in the estate of his deceased wife, contingent on the death of their minor child, does not entitle him to contest her will, because such interest is not regarded, in law, as a sufficient pecuniary interest for such purpose.—*Halde v. Schultz*, 17 S. D. 465, 97 N. W. 369, 371. Only interested persons can contest a will, and it has been held that creditors of an heir are not entitled to that right.—*Keeler v. Lauer*, 73 Kan. 388, 85 Pac. 541, 544; *Lockhard v. Stevenson*, 120 Ala. 641, 74 Am. St. Rep. 63, 24 So. 996; *Sheppard's Estate*, 170 Pa. 323, 32 Atl. 1040. Heirs of a testator have no standing to impeach the validity of his will, unless they first establish, by competent proof, that they were the heirs of the

testator, and would inherit his estate were it not for the will.—*Franke v. Shipley*, 22 Or. 104, 29 Pac. 268. A public administrator has no right to contest the proof of a will, as he is not a party interested in the estate.—*Estate of Hickman*, 101 Cal. 609, 612, 36 Pac. 118. Mandamus proceedings by the state against the superior court, by an original proceeding to compel the superior court to allow the state to appear as contestant in a proceeding therein pending for the probate of a will, will be dismissed where the petitioner rests its showing as to the interest of the state upon an allegation to the effect that "the deceased had no heirs residing in the state," and where the complaint does not aver that there were no heirs residing elsewhere, nor that the heirs, or any of them, were aliens.—*State v. Superior Court*, 148 Cal. 55, 2 L. R. A. (N. S.) 643, 82 Pac. 672, 673. Where the interest of a person seeking to contest an alleged will is not established by the pleadings, the trial court has power to require the contestant to establish his interest before proceeding with the trial of the issues involving the validity of the will.—*Estate of Land*, 166 Cal. 538, 137 Pac. 246. Where a testatrix dying without issue had separated from her husband three years before her death, her next of kin, in order to contest the will, must show that her husband was dead or divorced at the time of her death; there being no presumption from the lapse of such period of time.—*In re Siebs' Estate*, 70 Wash. 374, Ann. Cas. 1913E, 125, 126 Pac. 912. One whose only interest in a will is a legacy under a prior will giving him \$5000 is not "a person interested" who may contest the validity of the latter will which gives him the same amount payable at the same time.—*Estate of Land*, 166 Cal. 538, 137 Pac. 246.

(3) *Duty of executor to defend.*—It is the duty of an executor to defend against an attack upon the will he represents, and where the executor gives a cost bond on appeal, in case of a contest, a personal liability does not arise thereon, where, under the statute, it is provided that the estate must pay the costs.—*State v. Superior Court*, 28 Wash. 677, 69 Pac. 375, 377. It is the duty of an executor named in a will to take all steps necessary to carry into effect the intent and object of the testator.—*Estate of Riviere*, 7 Cal. App. 755, 96 Pac. 16. If a will is presented for probate, but is contested, the executor is entitled to recover against the estate for services rendered by an attorney, in aiding to establish the will.—*Estate of Riviere*, 7 Cal. App. 755, 96 Pac. 16.

6. *Time of contest. In general.*—By offering a will for probate, the proponents tender to the world the issue as to its genuineness. Any person interested may appear and contest the instrument so offered upon various grounds, including all grounds substantially affecting its validity, or the question of its due execution. Failing to appear and contest before probate, the right exists for one year after probate. One must be held to have had actual notice of the proceedings in time to make his contest, and he who fails to take advantage of the opportunity to oppose the will, by appearing and con-

testing within the time allowed by law, must at least, unless he can be held to have been prevented from so appearing and contesting by some fraud of those procuring the probate, be held concluded by the decree as to any matter concerning which he could have obtained relief by a contest.—*Tracy v. Muir*, 151 Cal. 363, 121 Am. St. Rep. 117, 90 Pac. 832, 834. A statement of opposition to the probate of a will may properly be filed at any time prior to hearing proofs of the will.—*Raleigh v. District Court*, 24 Mont. 306, 81 Am. St. Rep. 431, 61 Pac. 991, 993. In the case of a contest of a will before probate the California Code of Civil Procedure nowhere in terms prescribes when the written opposition must be filed. Obviously to be effectual as a contest before probate it must be filed before the alleged will is admitted to probate and the statute contemplates that it will be filed at or before the time designated in the notice for the hearing of the petition for probate. But the person proposing to contest before probate does not forfeit his right to do so merely by reason of failing to file his opposition at or prior to the time so designated in the notice for the hearing.—*Estate of Mollenkopf*, 164 Cal. 576, 129 Pac. 997. In the case of the contest of the probate of a will, written grounds of opposition must be filed, but there is no provision as to the time when such grounds must be filed; hence where a hearing was begun at 10 o'clock and after examination of certain witnesses, the hearing was postponed until 2 o'clock, before which time the written grounds were filed, they will be considered as filed in time.—*In re Mollenkopf's Estate*, 164 Cal. 576, 129 Pac. 997. In construing section 5166, Comp. Laws of 1909 of Oklahoma, as applied to infants and persons of unsound mind, said section must be read and construed in connection with section 5172, Comp. Laws, 1909, and when so read and construed it seems clear that the latter section relieves an infant of the diligence required of adults under section 5166, to contest the probate of a will within one year, or to show that the evidence relied upon was discovered since the probate of the will. Section 5172 gives an infant a right to contest the probate of a will upon either or all of the few grounds specified in said section 5166 free from conditions precedent in respect to diligence specified in said last section.—*Scott v. McGirth*, 41 Okla. 520, 139 Pac. 519. The Colorado probate act of 1903, as it affects the remedy of the heir who would contest the will, abolishes the common law procedure and being in derogation of the common law, should be strictly construed.—*Dunphy v. St. Mary's Hospital*, 60 Colo. 196, 199, 153 Pac. 89. The Colorado act of 1903, relating to probate matters, affords the non-resident heir, who would contest the will, no remedy but to appear and object to the probate at the time set for hearing, or, within one year thereafter to ask for a revocation of the order admitting the instrument to probate.—*Dunphy v. St. Mary's Hospital*, 60 Colo. 196, 199, 153 Pac. 89. Where a statute provided that every person who shall sign a testator's name to any will by his direction shall subscribe his own name as a witness to such will and state he sub-

scribed the testator's name at his request, and such provision was not complied with, but notwithstanding such failure the will was admitted to probate, the question must be raised in the probate court within the year allowed for contesting the will.—*Horton v. Barto*, 57 Wash. 477, 135 Am. St. Rep. 999, 107 Pac. 194. Where the contest of a will was not instituted within the year provided by the statute and the court thereby failed to acquire jurisdiction, a proper case for the issuance of a writ of prohibition is presented.—*State (ex rel. Wood) v. Superior Court*, 76 Wash. 27, 135 Pac. 496.

7. Grounds of contest.

(1) On ground of invalid execution.—As to allegations deemed insufficient to raise an issue as to whether or not a will was attested by two witnesses, who signed at the request, and in the presence, of the testator.—See *Estate of Burrell*, 77 Cal. 479, 19 Pac. 880.

REFERENCES.

Grounds of contest, and opposition to probate.—See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1312.

(2) Insanity.—Insane delusions are conceptions that originate spontaneously in the mind without evidence of any kind to support them, and can be accounted for on no reasonable hypothesis. The mind that is so disordered imagines something to exist, or imputes the existence of an offense which no rational person would believe to exist, or to have been committed, without some kind of evidence to support it. Where a testator, however, entertained a belief or suspicion of his wife's infidelity, and the illegitimacy of his children, but formed such belief or suspicion on an apparent cause, leading, on his part, to a view of his wife's conduct which was erroneous, unjust, and unnatural, this only shows an unfortunate error of judgment or a want of reasoning power, but not an absolute want of intellect on the subject, and hence, not an insane delusion.—*Potter v. Jones*, 20 Or. 239, 12 L. R. A. 161, 25 Pac. 769, 773. Where a belief is entertained, against all evidence and probability, and results in persistent and wholly unfounded notions against, and antipathy for, a relative, and such belief is persisted in after argument to the contrary, it would afford ground for inferring that the person entertaining it may be under an insane delusion.—*Medill v. Snyder*, 61 Kan. 15, 78 Am. St. Rep. 306, 58 Pac. 962, 965. Absolute insanity, as generally understood, is not required to be shown, to destroy testamentary capacity. There may be such a degree of "senile dementia," or a weakness of the understanding and reason, resulting from old age and repeated apoplectic attacks, followed by paralysis, as may be sufficient to sustain a finding of incapacity upon the issue of unsoundness of mind.—*Hudson v. Hughan*, 56 Kan. 152, 42 Pac. 701, 704. The existence of any insane delusion will not invalidate a will, but only the existence of such as actually influenced a testator in making a will, and which caused

prejudice and injury to the contestants.—*Estate of McKenna*, 143 Cal. 580, 588, 77 Pac. 461. Where testator's belief is not so fixed that he can not be reasoned out of it, it will not be held to be a delusion.—*In re Riordan's Estate*, 13 Cal. App. 313, 109 Pac. 629. One may have bad temper and under its influence have said and done wrong and unnatural things and still not be laboring under insane delusion as to objects of hostility.—*In re Riordan's Estate*, 13 Cal. App. 313, 109 Pac. 629. While the law takes no account of a man's religion, courts do recognize the fact that a man may through manifestations of religious belief evidence mental disorder, and while testamentary capacity is not to be measured by religious belief or opinion, yet if those opinions are of a nature which produces a will which is wholly the result of them, in other words, if the will in question would not have been made if the testator had not entertained some peculiar religious belief, his testamentary capacity may well be doubted so that when it appears that a testator is prompted by his belief in an insane religious delusion to make a will, the will can not be sustained.—*Ingersoll v. Gourley*, 72 Wash. 462, 129 Pac. 209. Insanity, to invalidate the will, must either amount to general mental incompetency, or some hallucination or delusion directly bearing upon and influencing the creation and terms of the will.—*In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130. Insanity on some particular subject is not necessarily fatal to will.—*In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130. Belief in spiritualism by a testator may, if played upon by another with the design to influence the testamentary disposition, invalidate the will on the ground of undue influence; but the belief is, of itself, no evidence of insanity.—*In re Hanson's Estate*, *Hanson v. Rhodes*, 87 Wash. 113, 151 Pac. 264. If the testator was of sound mind at the time the will was executed his precedent and subsequent condition is immaterial.—*In re Murphy's Estate*, 43 Mont. 353, 137 Am. St. Rep. 110, Ann. Cas. 1912C, 380, 116 Pac. 1009. On a contest of the probate of a will, on the ground of the alleged insanity of the testatrix, the evidence is reviewed and held not to show that the testamentary act was affected in the slightest degree by any or all of the abnormalities attributed to the testatrix, that the evidence of her sound and disposing mind was overwhelming, and that a nonsuit of the contest was properly granted.—*Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130.

REFERENCES.

Insane delusions, invalidate will when.—See note 63 Am. St. Rep. 94.

(3) **Undue influence.** In general.—The testator had a right to make a will and if he made it in his right mind in his own good judgment and desire to leave but a pittance to his brothers and sisters, that was his privilege and his right. The record suggests a reason therefor which no doubt seemed sufficient to him. It was also a privilege of his wife to solicit him to make a will in which he should leave to her the larger portion or all of his estate. She was his lawful wife and it was his duty to protect her by his will and he evidently desired to do

as he did in that respect. The whole record shows that at the time the will was made the testator was fully competent to make it and made it without any undue influence and it is his will.—*In re Enos Estate*, 79 Wash. 590, 140 Pac. 680. Undue influence may be accomplished, not only by physical coercion or threats of personal harm or abuse, but also by the insidious operation of a stronger mind upon one weakened and impaired by disease or otherwise, whereby the latter is subjected to the former, and induced to do his bidding, instead of acting in the exercise of unconstrained volition or judgment. It is not all influence brought to bear upon the mind of the testator in the disposition of his property that may be denominated "undue" influence.—*In re Holman's Estate*, 42 Or. 345, 17 Pac. 908. Undue influence may be either by fraudulent means or devices or by physical or moral coercion without actual deception.—*In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598. Whether or not the instrument was the natural result of the uncontrolled will of the testator is the ultimate test of the existence of undue influence.—*Estate of Stoddart*, 174 Cal. 606, 611, 163 Pac. 1010. Consideration of the question whether undue influence has or has not entered into the preparation and execution of a will involves, as the first inquiry, the opportunities, if any, had to exert such control over the intention of the testator.—*In re Dale's Estate*, *Tobias v. Mathews* (Or.), 179 Pac. 274. Opportunity to exercise undue influence upon the testator in the matter of making his will is not sufficient. The undue influence to render a will void must actually exist; it must be actually exerted, and it must be so exerted as to affect the terms of the will.—*In re Purcell's Estate*, 164 Cal. 300, 128 Pac. 932, 934. In the case of a will contest on the ground of undue influence, it is a point to be strongly met by the person charged with exerting such influence upon the testator, if it is proved that such person took an active part in the preparation of the will and is practically the sole beneficiary under it.—*In re Dale's Estate*, *Tobias v. Mathews* (Or.), 179 Pac. 274.

(4) *Same. Meaning of.*—Undue influence consists in the exercise of acts or conduct by which the mind of a testator is subjected to the will of the person operating upon it; some means taken or employed which have the effect of overcoming the free agency of the testator, and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment.—*Estate of Hodgdon*, 23 Cal. App. 415, 138 Pac. 111. It must be such as operates upon the mind of the testator at the time of making the will, and must be an influence relating to the will itself.—*Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762. Undue influence is such influence as imposes a restraint on the will of the testator, who, but for the restraint, would be free and responsible, so that his testamentary act is not the result of his own volition, but the will of another. The theory underlying the doctrine of undue influence is that the testator is induced by the means employed to execute an instrument in form and appearance his will, but in reality expressing

testamentary disposition which he would not have voluntarily made.—*Murphy v. Nett*, 47 Mont. 38, 130 Pac. 453. That is undue influence which amounts to constraint substituting will of another for testator's whether through threat or fraud.—*In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.

REFERENCES.

What constitutes undue influence.—See notes 2 L. R. A. 671, 4 L. R. A. 640, 738, 8 L. R. A. 261-263, 31 Am. St. Rep. 670-691.

(5) *Same*. To avoid will.—Undue influence, to avoid a will, must be such as to destroy free agency of the testator at the time the instrument is made. It must be a present restraint operating on the mind of the testator at the time of the making of the instrument.—*In re Miller's Estate*, 31 Utah 415, 88 Pac. 338, 342; *In re Cook's Estate*, *Cook v. Cook* (Okla.), 175 Pac. 507; *In re Higgins' Estate*, 156 Cal. 257, 104 Pac. 6; *Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307. The kind of undue influence that will destroy the instrument must be such as in effect destroyed the testator's free agency, and substituted for his own another person's will.—*Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597; *In re Weber's Estate*, 15 Cal. App. 224, 114 Pac. 597. Undue influence which will affect a testamentary act must be such influence operating upon the very act itself; and influence exerted and used prior to or at the time of the making of the will and of which the will is the product.—*Estate of Ricks*, 160 Cal. 450, 117 Pac. 532. The undue influence invalidating a will must be such as destroys free agency, constraining the testator at the time the will is made to make a disposition of his estate contrary to and different from what he would have done if he had been left to the free exercise of his own inclination or judgment.—*Estate of Ricks*, 160 Cal. 450, 117 Pac. 532. The undue influence which will invalidate a will is any improper or wrongful constraint, machination, urgency or persuasion, whereby the will of the person is overborne, and he is induced to do, or forbear to do, an act which he would not do, or would do, if left to act freely.—*Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171. The kind of influence that may be held to be undue influence warranting a repudiation of a will must be such as in effect destroyed the testator's free agency and substituted for his own another person's will. Mere general influence not brought to bear on the testamentary act is not undue influence, but the influence must be used directly to procure the will, and must amount to coercion destroying free agency on the part of the testator.—*Estate of Morcel*, 162 Cal. 188, 121 Pac. 733. Where a testator by designing means and improper influences has been deprived of his usual volition and induced to execute an instrument not his will, although such in form, but in reality the will of another, it is a fundamental rule in the law of wills to annul such instrument for undue influence even though it be conceded that the testator had testamentary capacity, the theory being that he did not freely exercise the same.—*In re Patterson's Estate*, 68 Wash. 377, 132 Am. St. Rep. 116, 123 Pac. 518. To destroy

the validity of a will "undue influence" must amount to coercion, compulsion or constraint, which destroys the testator's free agency and by overcoming his power of resistance obliges him to adopt the will of another instead of exercising his own. It must be brought to bear directly upon the testamentary act, and particularly parties must be benefited or disfavored as the result of the purpose and pressure of the dominating mind.—*Ginter v. Ginter*, 79 Kan. 721, 22 L. R. A. (N. S.) 1024, 101 Pac. 634. In order to establish undue influence sufficient to invalidate a will, it is not necessary to show the elements of duress, menace or fraud.—*Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171. Where it is shown that the testatrix did not understand the English language sufficiently to carry on an ordinary conversation or to comprehend the terms of the will which was read to her in the English language, and that the will was procured by the principal beneficiaries who stated to the scrivener the terms of the will and it was then drawn according to their dictation and not according to the dictation or desires of the testatrix and that it was not fully explained to her and that she did not understand it as it was read to her in the English language, the will should be set aside.—*In re Beck's Estate*, 79 Wash. 331, 140 Pac. 342.

(6) Same. What is not.—Kind treatment and even reasonable solicitation do not constitute "undue influence."—*In re Sturtevant's Estate*, *Sturtevant v. Sturtevant*, 92 Or. 269, 178 Pac. 192, 180 Pac. 595. If the will as made expresses the then well-settled determination of the testator himself concerning the disposition of his property, and there is nothing affirmatively shown to warrant the conclusion that the making of the will was suggested by any other party, it can not be held to have been obtained by undue influence, even though the determination of the testator to exclude a relative from participation in his property has been in part or even wholly caused by mere misrepresentation of fact by others as to such relative, or is the result of a quarrel or dispute with such relative, inspired and encouraged by another for the very purpose of bringing about a breach and a consequent disinheritance to his benefit.—*Estate of Morcel*, 162 Cal. 188, 121 Pac. 733. Nothing less than pressure which destroys free agency can be considered such undue influence as to render invalid the will of a testator.—*In re Packer's Estate*, 164 Cal. 525, 129 Pac. 778, 779. A will executed upon the faith of a promise on the part of the beneficiary that she would distribute the estate among certain nieces and cousins of the deceased and certain charitable institutions according to the wish and intent of the decedent, if honestly made, can not be said to be procured by fraud or undue influence. If, however, after the death of the testator, the beneficiary fails or refuses to perform the promise, a different question arises, and, although the will stands unaffected, the beneficiary and the property may be charged with a trust in favor of the intended beneficiaries.—*Estate of Everts*, 163 Cal. 449, 125 Pac. 1058. Mere persuasion, argument, or importunity addressed to the judgment or affections in which there is no fraud or deceit or coercion does not consti-

tute undue influence. To vitiate a will an influence must be shown which at the time of the testamentary act, controlled the volition of the testator and prevented an exercise of his judgment and choice.—In *re Patterson's Estate*, 68 Wash. 377, 132 Am. St. Rep. 116, 123 Pac. 518. Undue influence can not be exerted upon a person who is so far insane or unconscious as to be destitute of testamentary capacity.—In *re Murphy's Estate*, 43 Mont. 353, Ann. Cas. 1912C, 380, 137 Am. St. Rep. 110, 116 Pac. 1005.

(7) **Fraud, etc.**—An intent to deceive a decedent, or an intent to induce him to execute his will, is always an element, and a necessary element, in any given state of facts, to constitute actual fraud. The same fraud or misrepresentation that will vitiate a contract will vitiate a will.—*Estate of Benton*, 131 Cal. 422, 63 Pac. 775, 777. See *Estate of Kohler*, 79 Cal. 313, 21 Pac. 758. Fraud, defined generally, consists of false statements or false pretenses, or the employment of any trick or devise or means of deception for the purpose of defrauding another.—*Estate of Ricks*, 160 Cal. 468, 117 Pac. 539. Fraudulent representations, in order to defeat a will, must have been made prior to or at the time the will was executed. In the present case, it is held, after a review of the evidence, that no such representations were shown, and particularly, that there was no evidence that the son, who was the main beneficiary under the will, had falsely or fraudulently represented to the testatrix that an agreement had been made with the contestant, whereby he relinquished any right to share in her estate.—*Estate of Ricks*, 160 Cal. 450, 117 Pac. 532.

(8) **Fraud and undue influence.**—Fraud and “undue influence” are not synonymous terms. Undue influence is, in one sense, a species of fraud; and while elements of fraud are sometimes present, undue influence may exist without any positive fraud being shown.—In *re Shell's Estate*, 28 Colo. 167, 63 Pac. 413. The definition of undue influence and fraud, as appearing in the code, under a chapter relating to contracts, and entitled “Consent,” is applicable in determining issues relating to undue influence and fraud in proceedings to contest a will, and instructions based thereon are not improper.—*Estate of Kohler*, 79 Cal. 313, 21 Pac. 758, 759. Undue influence consists in the exercise of acts or conduct by which the mind of the testator is subjected to the will of the person operating on it; some means taken or employed which have the effect of overcoming the free agency of the testatrix and constraining her to make a disposition of her property contrary to and different from what she would have done had she been permitted to follow her own inclination or judgment. Fraud, defined generally, consists of false statements or false pretenses, or the employment of any trick or device or means of deception for the purpose of defrauding another.—*Estate of Ricks*, 160 Cal. 468, 117 Pac. 539. Undue influence and fraud are not identical. The one has reference to the subjection of the will of the testatrix and controlling it. The other to a deception practiced upon the testator. While in a sense undue influence is a

species of fraud, it may be exercised without any actual fraud, or false representation being made to the testator.—Estate of Ricks, 160 Cal. 468, 117 Pac. 539. As relating to the execution of a will, "fraud" is a species of undue influence; but undue influence may be exercised otherwise than through fraud. Hence, where the mind of the testatrix was so perverted by deceit or other sinister means that she lacked power to give expression to her true desires, provisions of the will procured by such influences are void, though she possessed capacity to make the will and was under no coercion.—Hopper v. Sellers, 91 Kan. 876, 139 Pac. 365. Generally the same considerations control when a testator is unduly influenced by misrepresentations and artifices usually comprehended by the term "fraud." Although in strictness fraud and undue influence are distinguishable more often than otherwise, it is a mere matter of a choice of terms. Always something sinister is involved which perverts the testator's will by overcoming his power to express his real desires.—Ginter v. Ginter, 79 Kan. 721, 22 L. R. A. (N. S.) 1024, 101 Pac. 634. Undue influence and fraud constitute two separate and distinct grounds, upon proof of either of which a will may be declared invalid, and proof simply of fraud or fraudulent representations will not support equally an issue of undue influence or an issue of fraud.—Estate of Ricks, 160 Cal. 469, 117 Pac. 539. Undue influence and fraud are separate grounds for attacking a will, but fraud or misrepresentation may be an element of undue influence.—Estate of Stoddart, 174 Cal. 606, 163 Pac. 1010. Mere fraud does not constitute undue influence, but is an entirely separate and distinct ground for invalidating a will, and while undue influence may be exerted by means of fraud, there can be no such influence without an impairment of the free agency of the testator.—Estate of Morcel, 162 Cal. 188, 121 Pac. 733. When fraud or fraudulent representations made to the testator are relied on as an element in undue influence, it must appear not only that the representations were false and believed to be true by the testatrix, but that they were made the basis of importunity and mental pressure upon the testatrix, and that the testamentary act was the product thereof. When this appears, such fraud is an element in undue influence and upon the proof of its employment to overcome the will of the testator, a finding of undue influence may be based.—Estate of Ricks, 160 Cal. 468, 117 Pac. 539. On the other hand, representations which are false, while they may exert an influence upon the testamentary disposition, unless they are made not only for that purpose, but are used as pressure upon the mind of the testatrix to affect the disposition of her property, constitute fraud purely. If the testatrix, under a belief in the truth of such false statements, and influenced by them, makes a will disinheriting one who, but for a belief in their truth, would otherwise have been provided for in it, the will is the product of fraud on the testatrix and subject to be declared invalid for that reason.—Estate of Ricks, 160 Cal. 468, 117 Pac. 539. Fraud without undue influence may exist.—In re Snowball's Estate, 157 Cal. 301, 107

Pac. 598. Mere opportunity or suspicion does not constitute fraud or undue influence.—*In re Weber's Estate*, 15 Cal. App. 224, 114 Pac. 597. One who attacks a will as having been executed under undue influence is controlled by the principle of law that he who asserts a fraud must prove it.—*In re Sturtevant's Estate*, *Sturtevant v. Sturtevant*, 92 Or. 269, 178 Pac. 192, 180 Pac. 595. It is held in this contest to the probate of a will on the ground of mental incompetency and undue influence, that the theory of the contestant that the testatrix was neither a lunatic, idiot, nor an imbecile, nor a victim of insane delusions, but was a person of arrested mental development, was amply sustained by competent and properly admitted testimony, portraying a woman utterly incompetent at any time to understandingly and intelligently consider her property with a view of its disposition by will, and also utterly incompetent alone and unaided to compose and write the document offered for probate as her last will.—*Estate of De Laveaga*, 165 Cal. 307, 133 Pac. 307.

REFERENCES.

Wills procured by fraud, undue influence, duress, etc., will be denied probate when.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1272.

(9) *Construction of statute*.—The law of California, by enumerating specific grounds on which the probate of a will may be contested, does not mean to declare that the principles of *res judicata* and *estoppel* by judgment are inapplicable to such a contest, because not expressed in the enumeration.—*Estate of Chase*, 169 Cal. 625, 147 Pac. 461.

8. *Waiver of right to contest*.—Agreement by heir or legatee under a prior will whereby he waives his right of contest is legal and is sufficient consideration for agreement by legatees under later will to compensate him and will be enforced in absence of fraud or other vitiating element, and presumption is that it was fair and honest.—*Ruth v. Krone*, 10 Cal. App. 770, 103 Pac. 960. Where a devise was made in favor of plaintiff under a prior will, and a second will devised the whole property to one of the defendants, the plaintiff had the legal right to contest the second will on the grounds of incompetency of the deceased to make it and undue influence of said defendant exerted over the deceased, and the waiver of that right of contest constitutes a sufficient consideration for a note given by such defendant to the plaintiff.—*Harris v. Munro Co.*, 10 Cal. App. 589, 102 Pac. 821.

9. Pleadings.

(1) *In general*.—A statement "that the will is contrary to the laws of the state of California, as made and provided by section 1313 Civil Code," is not the allegation of any fact, but is merely a legal conclusion.—*Estate of Lennon*, 152 Cal. 327, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024, 92 Pac. 870, 871. Defective and insufficient pleadings can be as well reached in a probate court by demurrer as in a district court, and hence no judgment, for want of an answer, can be taken against

a party in a probate court, who has demurred within the time allowed.—*Leggett v. Meyers*, 1 Ida. 548, 549. A petition stating the necessary jurisdictional facts is a necessary prerequisite to the probate of a will within the meaning of sections 1157 and 1159, L. O. L. Where no such petition has been filed, there is nothing to contest and a contest is wholly futile.—*In re Burk's Estate*, 66 Or. 252, 134 Pac. 11.

(2) **Unsoundness of mind.**—In stating the grounds of contest of the probate of a will, if unsoundness of mind is relied on, it is sufficient to state that the deceased, at the time of the alleged execution of the reported will, was not of sound and disposing mind. Unsoundness is the ultimate fact to be found, and all testimony as to acts of inebriety or other causes is for the jury, from which they are to find; and the issue upon that subject is to be of the ultimate fact only. But when the grounds of contest embrace duress, menace, fraud, undue influence, due execution and attestation, subsequent will or the like, such matters, not being ultimate facts, but conclusions of law to be drawn from facts, must be pleaded. The facts (not evidence of the facts) relied on, must be stated, and the issues relating thereto submitted to the jury, to the end that the court, either upon demurrer to the statement of the grounds of the contest, or upon the verdict, may determine whether, as matter of law, such facts so pleaded or found, constitute a valid reason why the purported will should not be admitted to probate.—*Estate of Gharky*, 57 Cal. 274, 279.

(3) **Undue influence.**—An averment of "undue influence," only in general terms, is a conclusion of law, and is fatally defective. Undue influence is a legal conclusion to be drawn from certain facts, and the facts must be pleaded.—*Estate of Sheppard*, 149 Cal. 219, 85 Pac. 312, 313. See *Estate of Gharky*, 57 Cal. 279. In a will contest, allegations at the conclusion of the pleading to the effect that by reason of the "aforesaid relations," and by reason of the undue influence over the testator, as alleged in the complaint and grounds of opposition, a certain person acquired over the mind of the testator an influence, whereby he was enabled to procure the testator to make the will in question, are sufficient to show the particular acts constituting the undue influence.—*Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171. If a will, invalidated because of the testator's incompetency and as the result of undue influence, expressly cuts off any beneficiary who contests it, the part so expressing is invalidated with the rest of the will, and a complaint based thereon requires no answer.—*Estate of Baker*, 176 Cal. 430, 168 Pac. 881.

10. Issues. Jury trial of.—Proceedings to contest the probate of a will are in their nature equitable, and the trial of issues of fact therein by a jury is not a matter of right unless authorized by statute.—*Clayson v. Clayson*, 26 Wash. 253, 66 Pac. 410, 411. In Oklahoma, a proceeding to contest a will is not a suit at common law, wherein the parties are entitled to a trial by jury as a matter of

right, under the seventh amendment to the Federal constitution.—*Cartwright v. Holcomb*, 21 Okla. 548, 97 Pac. 385. If a will has been contested before its probate, and the contest has been tried before a jury, its subsequent contest should be expeditiously dealt with by the court itself, and it is not, therefore, an abuse of discretion, but within the well-defined policy of the law, to refuse a jury trial in such subsequent contest.—*Estate of Dolbeer*, 153 Cal. 652, 15 Ann. Cas. 207, 96 Pac. 266, 270. Under the Idaho statute, where a written demand for a jury in a contest over the probate of a will is on file in the probate court, either party is authorized to enforce its demand in the district court, and the district court, or the judge thereof, may order a jury without a renewal of the demand in writing before that court.—*Pine v. Callahan*, 8 Ida. 684, 71 Pac. 473, 475. If there is evidence, in a contest over the probate of a will, tending to show undue influence, or ignorance of the contents of the will, which, if believed by the jury, would uphold a verdict, the court should submit to the jury, under appropriate instructions, controverted questions for their findings.—*Snodgrass v. Smith*, 42 Colo. 60, 15 Ann. Cas. 548, 94 Pac. 312, 313. It is not error for the court to refuse a jury trial upon a hearing to show cause for withholding a will from probate.—*Gallon v. Haas*, 67 Kan. 225, 72 Pac. 770. The right to a trial by jury secured by the constitution has no reference to or bearing upon proceedings in probate, and the right thereto in such proceedings exists only where the statute expressly confers it.—*Estate of Land*, 166 Cal. 538, 137 Pac. 246. Section 1312 of the Code of Civil Procedure of California limits the issues of fact that may be tried by a jury to those substantially affecting the validity of the will.—*Estate of Land*, 166 Cal. 538, 137 Pac. 246. Under the Colorado statute the contestor has the right to have the issue as to whether the writing in question is the last will and testament of the decedent tried to a jury and where both parties requested the court to direct a verdict and the contestor after the refusal of the court to direct a verdict in his favor, failed to request that any specific issue of fact be submitted to the jury, waived his right and the refusal of the court to submit the question to the jury upon the general issue was not error.—*Butcher v. Butcher*, 21 Colo. App. 416, 122 Pac. 400. Where a judge admits a contested will to probate, and an appeal is taken to the circuit court, the contestant is entitled to have the issues tried by a jury, but the court may direct a verdict where the facts require it.—*Re Will of Kalna*, 23 Haw. 149, 155. If, in a will contest, the only evidence that tends to show undue influence, is that the attorney who, acting under the instructions of the testatrix, drew the will was a member and trustee of a church organization named in the will as one of the beneficiaries; and that such attorney, after having first declined the request of the testatrix to act under the will as executor and trustee, suggested the name of a trust company to act in that capacity, which suggestion was adopted and acted upon, the evidence wholly fails to show undue influence

upon the making of the will and is not sufficient to go to the jury upon that issue.—*Re Will of Kalna*, 23 Haw. 149, 154. The contestant is not entitled to a jury trial upon the question of his interest.—*Estate of Land*, 166 Cal. 538, 137 Pac. 246. In a contest of a will on the ground of fraud and undue influence, where two former wills were allowed in evidence for the purpose of showing the state of mind and feeling of the testator toward the beneficiary, it was for the jury to determine what feeling or state of mind toward those beneficiaries was indicated by these wills.—*Estate of Everts*, 163 Cal. 449, 125 Pac. 1058. Held not prejudicial error for court of its own motion to take issue of undue influence from jury, evidence being conclusive on court in proponents' favor.—*In re Higgins' Estate*, 156 Cal. 257, 104 Pac. 6. If there is no evidence to establish the fact that the will in controversy was executed under undue influence, the ruling of the trial court refusing to let the issues go to the jury is correct.—*Auld v. Cathro*, 20 N. D. 461, 128 N. W. 1025. The verdict of the jury, where the probate of a will is contested, is simply advisory to the court.—*In re Hackett's Estate*, *Hackett v. Hackett*, 33 S. D. 208, 212, 145 N. W. 437. A jury, who are to determine upon the mental capacity of a testator, have the right to consider the terms of the will, whether reasonable or unreasonable, in accordance with or opposed to natural justice, in order to decide whether the decedent was capable of disposing of his property by will.—*Nelson v. Nelson*, 27 Colo. App. 104, 146 Pac. 1079. Where elaborate depositions have been taken in another state to be read to a jury, called in to determine the testamentary capacity of a decedent, the trial court should, before such reading, pass upon the objections noted therein, so that nothing incompetent, irrelevant, or immaterial contained in the depositions shall be heard by the jury.—*Estate of Martin*, 170 Cal. 657, 151 Pac. 138. The question whether the influence brought to bear upon a person of sound mind to induce such person to make a will favoring the person exerting the influence, is one of fact for the trial court to determine, where there is no jury.—*In re Street's Estate*, *Street v. Upton*, 179 Cal. 262, 176 Pac. 446.

REFERENCES.

Right to jury trial of will contest.—See note 15 *Ann. Cas.* 211.

11. Burden of proof.

(1) *In general*.—In the matter of the contest of a will, the burden of proof lies on the contesting party.—*In re Williams' Estate*, *Williams v. Davis*, 50 Mont. 142, 145 Pac. 957. Every fact necessary to show the proper execution of a will must be proven by the proponent.—*Wendl v. Fuerst*, 68 Or. 283, 136 Pac. 1. In a contest over the probate of a will, the burden of sustaining, before the jury, the issues formed by the answer, is upon the contestants, and the contestants therefore have the right to open and close the argument.—*In re Van Alstine's Estate*, 26 Utah 193, 72 Pac. 942, 947; *Farleigh v. Kelley*, 28 Mont. 421, 63 L. R. A. 319, 72 Pac. 756, 758. If the probate of a will is formally

contested on the ground of fraud and undue influence of a beneficiary, and the mental incapacity of the testator, the burden of proof is on the contestant, after the proponent has proved execution.—*Tiger v. Peck* (Okla.), 176 Pac. 529. When a contested will appears to have been duly executed and attested according to the statute of wills, the law presumes it to be valid. This presumption must be overcome by proof and the burden of proof rests upon whoever alleges it to be the product of undue influence or fraud.—*Ginter v. Ginter*, 79 Kan. 721, 22 L. R. A. (N. S.) 1024, 101 Pac. 634. Where a contest is filed in the probate court in opposition to the probate of a will and upon the hearing proof is offered by the proponent showing a due execution of the will, the burden of proof is upon the contestant to disprove the *prima facie* case made by the proponent.—*Head v. Nixon*, 22 Ida. 765, 128 Pac. 557. That section of the California code, relating to the manner of proving the execution of wills and framing issues in contests opposing probate thereof, has been adopted into the statutes of Wyoming, and while the supreme court is not bound by the decisions of that state construing those statutes placing the burden of proof upon the contestant, that construction is persuasive and ought to be accepted and followed in Wyoming.—*Wood v. Wood*, 25 Wyo. 26, 50, 164 Pac. 844.

(2) As to mental incapacity and insanity.—One contesting a will on the ground of the testator's mental incapacity has the burden of proof.—*Estate of Allen*, *Allen v. Elliott*, 177 Cal. 668, 687, 171 Pac. 686. In a case where the contest of a will has been initiated before the admission of the instrument to probate, the burden is on the proponent to prove the testator's mental capacity at the time of the execution and also to prove the execution itself; the burden then shifts to the contestant.—*In re Hanson's Will*, 50 Utah 207, 167 Pac. 256. A child of a testator, contesting the will on the ground of mental incapacity and undue influence, the latter as exercised by a grandchild and her husband, has the burden of proof; but if the proof be that this couple had the testatrix wholly under their influence, that they poisoned her mind against the daughter and caused the testatrix to destroy a will tending to an equal distribution and to execute the present one, by which the daughter is practically disinherited, the will should be set aside.—*In re Dale's Estate*, *Tobias v. Mathews*, 92 Or. 57, 179 Pac. 274. In a contest over the probate of a will, the burden is on the contestant to show affirmatively, and by a preponderance of evidence, the insanity of the testator, if the contest is based upon that ground; and the evidence on appeal, where proper exception is taken, is to be considered in view of this burden which the law casts upon him.—*Estate of Dolbeer*, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695, 697; *Estate of Wilson*, 117 Cal. 262, 270, 49 Pac. 172; *Estate of Nelson*, 132 Cal. 182, 191, 64 Pac. 294; *Estate of Latour*, 140 Cal. 414, 73 Pac. 170, 74 Pac. 441. One who contests a will on the ground of insanity has the burden of proving by a preponderance of evidence that the testator was insane when executing the instrument.—*In re Hanson's Will*, 50

Utah 207, 167 Pac. 256. The presumption of sanity of the testator imposes upon the contestant to the probate of the will the burden of proving by a preponderance of evidence to the contrary, and that testator was not of sound mind, or was under undue influence, at the time of making the will.—Wood v. Wood, 25 Wyo. 26, 50, 164 Pac. 844. In the contest of the will in this case on the ground of mental incompetency, the findings of the court to the effect that the testator was not mentally competent are held to be sustained by the evidence.—Estate of Loveland, 162 Cal. 595, 123 Pac. 801.

REFERENCES.

Presumption and burden of proof as to sanity with relation to wills.—See note 36 L. R. A. 721, 724, 733.

(3) As to undue influence.—The burden of proof rests upon him who asserts undue influence.—Ekern v. Erickson, 37 S. D. 300, 312, 157 N. W. 1062; In re Hanson's Will, 50 Utah 207, 167 Pac. 256. The burden of proving undue influence is on the contestant, and this burden has not been sustained in the present case.—Estate of Kilborn, 162 Cal. 4, 120 Pac. 762. On the contest of a will on the ground of undue influence the burden of proof is on the contestant to show facts from which an inference of undue influence could reasonably be drawn.—Estate of Morcel, 162 Cal. 188, 121 Pac. 733. One who contests the probate of a will on the grounds of incompetency and undue influence has the burden of proof.—Estate of Willits, 175 Cal. 173, 165 Pac. 537. A codicil to a will, if formally admitted to probate, is established prima facie, for all the purposes of a contest, that it was duly executed in the manner required by law by a testator competent to do so, free from undue influence; and the person contesting it has the burden of proof.—Estate of Baird, 176 Cal. 381, 168 Pac. 561. If a person, who had a confidential relation with a testator and actually participated in having the will executed, unduly profits as a beneficiary under the instrument, the burden is on him to show that the execution was not the result of his coercion or fraud.—Estate of Baird, 176 Cal. 381, 168 Pac. 561. The mere existence of confidential relations between a testator and a beneficiary under his will does not raise a presumption that the beneficiary has exercised undue influence over the testator and does not cast upon the beneficiary the burden of disproving undue influence. These consequences follow only when the beneficiary has been actively concerned in some way with the preparation or execution of the will.—Ginter v. Ginter, 79 Kan. 721, 22 L. R. A. (N. S.) 1024, 101 Pac. 635. In all such cases the proof must be substantial so that the judges of fact, having a proper understanding of what undue influence is, may perceive by whom and in what manner it has been exercised, and what effect it has had upon the will.—Ginter v. Ginter, 79 Kan. 721, 22 L. R. A. (N. S.) 1024, 101 Pac. 634. Where a wife makes a will in favor of her husband, no legal suspicion of undue influence arises from their confidential relations so as to impose on him the burden of proving that he has not unduly influenced her in making the will; but such rela-

tion and the opportunity afforded thereby may be taken into consideration with other evidence to prove undue influence on his part.—Estate of Hodgdon, 23 Cal. App. 415, 138 Pac. 111. Will denied probate as made through undue influence and by a person of unsound mind. The testator, a man nearly eighty-five years of age—a father and grandfather and on good terms with his family—was induced by a female spiritualistic practitioner to leave home and to live with her in a distant state. In three years she induced him to transfer to her property to the amount of nearly \$85,000, and then, at the age of 88 years to make the will in question disposing of the trifling balance of his estate.—Estate of Willits, 175 Cal. 173, 165 Pac. 537. The burden of showing absence of undue influence in the making of a will is upon the executor when he is also the largest beneficiary and was the testator's attorney and prepared the will.—Gidney v. Chapple, 26 Okla. 737, 110 Pac. 1105.

12. Evidence, generally.

(1) Competency of witnesses, limitations, execution of will, etc.—The rules applying to conflicts in and weight of evidence, and credibility of witnesses, is generally the same in a will contest as in other cases of law tried before the court or jury.—In re Miller's Estate, 31 Utah 415, 88 Pac. 338, 346; and California cases cited in the opinion construing a similar statute. The subscribing witnesses to a will are subject to the same rules, as to contradiction and impeachment, as other witnesses.—Farleigh v. Kelley, 28 Mont. 421, 63 L. R. A. 319, 72 Pac. 756, 759. Declarations of an absent witness, in support of the validity of a will, can not be received in evidence for any purpose whatever, for such declarations are hearsay.—Farleigh v. Kelley, 28 Mont. 421, 63 L. R. A. 319, 72 Pac. 756, 760. All parties interested are competent to testify to any fact which is relevant and material to the issue involved, where the controversy is between living parties, who, upon the one side, are the devisees or legatees under a will, and on the other, the heirs at law of the testator.—In re Miller's Estate, 31 Utah 415, 88 Pac. 338, 345 (overruling In re Atwood's Estate, 14 Utah 1, 60 Am. St. Rep. 878, 45 Pac. 1036, where the statute was given application in the contest of a will). A contest of the probate of a will is not limited to questions concerning the testator's freedom from duress, menace, fraud, or undue influence, or the due execution of the attestation of the will itself. Any question which affects the validity of the will may properly be the subject of controversy.—Farleigh v. Kelley, 28 Mont. 421, 63 L. R. A. 319, 72 Pac. 756, 759. It is within the discretion of the court to control the order of proof, and require the contestant of the probate of a will first to establish his interest.—Estate of Edelman, 148 Cal. 236, 113 Am. St. Rep. 231, 82 Pac. 962; Estate of Wickersham, 153 Cal. 603, 96 Pac. 311, 314. The contestant, in a proceeding to contest the probate of a will, is not limited to the testimony of the subscribing witnesses of the will as to the mental capacity of the testator at the time of executing the same.—Ashworth

v. McNamee, 18 Colo. App. 85, 70 Pac. 156. In a contest over the probate of a will, where the will provides for a bequest, and the testator accompanies the bequest with a request to dispose of the same in the manner "specified in my letter to him of this date," such letter is properly excluded from evidence.—Estate of Shillaber, 74 Cal. 144, 5 Am. St. Rep. 433, 15 Pac. 453, 454. But a letter written to the contestant (who managed the property of the deceased), by the proponent prior to the death of the testatrix, advising him of the receipt of a monthly draft for the deceased and as to how much she would need per month for the future, is admissible, as tending to show the actual transaction of the business of deceased by the proponent.—Estate of De Laveaga, 166 Cal. 607, 133 Pac. 307. In making his proof a contestant is not limited to the bare facts which he may be able to adduce, but he is entitled to the benefit of all inferences which may be legitimately derived from established facts.—Ginter v. Ginter, 79 Kan. 721, 22 L. R. A. (N. S.) 1024, 101 Pac. 634. Suspicion, conjecture, possibility, or guess that undue influence or fraud has induced a will is not sufficient to support a verdict to that effect.—Ginter v. Ginter, 79 Kan. 721, 22 L. R. A. (N. S.) 1024, 101 Pac. 635. Every favorable inference fairly deducible, and every favorable presumption fairly arising, from evidence produced, must be considered proved in favor of the contestant.—In re Daly's Estate, 15 Cal. App. 329, 114 Pac. 787. Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, court must take view most favorable to contestant.—In re Daly's Estate, 15 Cal. App. 329, 114 Pac. 787. All evidence in favor of contestants must be considered true, and if contradictory evidence has been given it must be disregarded.—In re Daly's Estate, 15 Cal. App. 329, 114 Pac. 787. Where a servant of the testator testified on re-examination that the son called on his father more frequently than when she was first employed, the court did not err in sustaining an objection to a further question as to whether she heard any loud talking between them, on the ground that it was immaterial, irrelevant, and incompetent, and not re-examination, when it was not proposed to show that the loud talking had any relation to any issue in the case or that it was to be followed up in any way or explained.—Estate of Weber, 15 Cal. App. 224, 114 Pac. 597. Declarations of intent not to contest a will made after a settlement would be entirely consistent therewith, and would not tend to impeach the settlement agreement or show bad faith in making the claim.—Snowball v. Snowball, 164 Cal. 476, 129 Pac. 785. A paragraph of the will of the mother of the testatrix charging her executors with the care and protection of the testatrix is admissible, where the proponent had testified that the mother had not made any such request, and no objection is made to the introduction of the same on the ground of impeachment upon a collateral matter notwithstanding that a motion was thereafter made to strike out upon such ground.—Estate of De Laveaga, 166 Cal. 607, 133 Pac. 307. The court is not compelled to strike out evidence re-

ceived without a sufficiently specific objection, where such objection is practically available to the party before the admission of the evidence, and may refuse to do so in the exercise of a reasonable discretion.—*Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307. A letter written by a witness to the contestant that the testatrix was incapable of taking care of herself is improperly admitted on the ground of surprise, where the witness had failed in her deposition to give expected testimony in favor of the contestant.—*Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307. The attempted impeachment of the testimony of a witness as to the mental incompetency of the testatrix, by showing that he had presented a bond with her as surety thereon without intimating to the judge that she was an incompetent person, is properly rebutted by testimony of the witness' knowledge that the deceased was mentally weak and that the family of which he was a member, while recognizing such fact, they, for the purpose of protecting her and preventing a disclosure of her incompetency, adopted and uniformly carried out a policy of having her business transacted in her own name with the understanding that they stood behind and in support of everything that was done.—*Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307. The court had the right to believe the testimony of the executor, as against the testimony of both of the witnesses to the will who testified for the contestant that they did not know what they were signing and that the testator did not explain it to them.—*Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597. While, in a contest over the probate of a will, its construction is not before the court and can not be determined, yet the court can examine the contents of the will as an incident, where it would aid in determining the validity of its execution.—*In re Byford's Will* (Okla.), 165 Pac. 194. The due execution and attestation of the will of a full-blood Indian member of the Five Civilized Tribes, devising real estate, which disinherits a parent, wife, spouse, or children of such Indian, involves the question of whether or not such will is acknowledged and approved pursuant to the act of congress.—*In re Byford's Will* (Okla.), 165 Pac. 194. Where a man contests the probate of a will of his divorced wife, contending that her marriage to him was subsequent to the execution of the will and therefore annulled it, and the proponent of the will meets the contention with the claim that the alleged marriage was void because entered into when the man had another wife living and undivorced, the man's affidavit, filed in a court in another state in divorce proceedings against the first wife, made as a basis for publication of summons against such wife, is admissible to show that said wife could not be found in that state.—*Estate of Pusey*, 177 Cal. 367, 170 Pac. 846. In proceedings on the contest of a will there must be reduced to writing and filed in the cause the proofs of the subscribing witnesses and the formal testimony of the proponent, produced at the probate, to the effect that the instrument was duly executed and that the testator was, at the time, of sound and disposing mind, and free from all duress, menace, fraud, or undue

influence.—*Wood v. Wood*, 25 Wyo. 26, 164 Pac. 844. Where the contest of a will has resulted in mistrials from failure of the jury to agree, the court has no power to order the payment of the expenses of the contestants out of the estate in the hands of a special administratrix, and the order for such payment is void.—*Estate of Yoell*, 160 Cal. 741, 117 Pac. 1047.

(2) **Communications with attorneys.**—The privilege between an attorney and client, as to communications or statements made by the deceased to his attorney preparing the will, with respect to the subject-matter thereof, and what the attorney heard or saw with respect thereto, do not fall within the privilege of the statute as to communications between attorney and client under the Utah statute, which, in effect, is no broader than the common law upon the subject.—*In re Young's Estate*, 33 Utah 382, 126 Am. St. Rep. 843, 14 Ann. Cas. 596, 17 L. R. A. (N. S.) 108, 94 Pac. 731, 734. As between heirs or beneficiaries of a deceased person in a will contest, where undue influence or want of capacity is in issue, neither side can invoke the privilege as against the testimony of an attorney who prepared the will under the direction of the deceased, and the attorney should be required to disclose all matters relevant to such issues, the same as any other person cognizant of the facts would be.—*In re Young's Estate*, 33 Utah 382, 126 Am. St. Rep. 843, 14 Ann. Cas. 596, 17 L. R. A. (N. S.) 108, 94 Pac. 731, 735. Under the Colorado statute, an attorney is incompetent to testify as to communications made to him by the testator while serving him in the preparation of the will, where such attorney is himself a beneficiary under the will.—*In re Shapter's Estate*, 35 Colo. 578, 117 Am. St. Rep. 216, 6 L. R. A. (N. S.) 575, 85 Pac. 688, 691. As to the same rule in states where interest generally affects the competency of a witness to testify, see *Smith v. Smith*, 163 Ill. 488, 489, 48 N. E. 96; *Bardell v. Brady*, 172 Ill. 420, 50 N. E. 124. Where a will is attacked for undue influence, evidence of the attorney who drew the will as to who gave him the data therefor and whose instructions he followed in preparing the same, is not objectionable as a disclosure of confidential communications.—*Kerr v. Kerr*, 85 Kan. 460, 116 Pac. 881. If the probate of a will is contested, testimony of the attorney who drew the will, as to a prior conversation had between him and the testator as to the latter's property is unobjectionable on the ground of having been the communication of a client to his attorney and privileged; such evidence may properly be received, but solely upon the ground that an attorney who drafts a will is presumed to impartially represent the estate and to be without bias.—*Johnson v. Shaver* (S. D.), 172 N. W. 676, 680.

REFERENCES.

Privilege of communication to attorney during preparation of will.—
See 17 L. R. A. (N. S.) 108-113.

(3) **Declarations of legatees, etc.**—Admissions and declarations of the legatee are admissible in evidence against the will, where he is the sole beneficiary under it. Such evidence is admissible not only as bearing on the credibility of the legatee, when a witness, but also as substantive evidence of an admission against interest as a fact in issue, and is competent, no matter when made. The time, place, and circumstance of their making go to the weight, not to the competency of the evidence.—*In re Miller's Estate*, 31 Utah 415, 88 Pac. 338, 343. Evidence of acts and declarations of one legatee or devisee can not be admitted against the individual legatee or devisee who makes them, where the mental incapacity of the testator is the question in issue.—*Estate of Dolbeer*, 149 Cal. 227, 246, 9 Ann. Cas. 795, 86 Pac. 695. Declarations and admissions made by the executor and sole beneficiary of the will are admissible against him to establish any fact in issue upon the validity of the will which they have a tendency to establish, and are not limited solely to the purpose of showing the feelings and relations existing between the parties.—*Estate of Ricks*, 160 Cal. 469, 117 Pac. 539. While the general rule is that declarations or admissions of one of several executors, devisees, or legatees are inadmissible in an attack on the validity of a will, because the interests of the parties are several and not joint, this rule has no application where this condition of severalty of interests does not exist.—*Estate of Ricks*, 160 Cal. 469, 117 Pac. 539. Declarations of the contestee as one legatee, made without the presence of the other legatees, are hearsay and not binding upon them; nor can a will be invalidated as against one legatee and upheld with respect to the other legatees.—*Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915. Where the fact that the testatrix had committed suicide was substantially admitted, the rejection of a declaration of the beneficiary under the will to that effect was without prejudice.—*Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130. Declarations made by the beneficiary, thirteen years after the execution of the will, evidencing his opposition to any change being made therein to the advantage of the contestant, are insufficient of themselves to show undue influence or false representations on the part of such beneficiary.—*Estate of Ricks*, 160 Cal. 450, 117 Pac. 532. Declarations of a stranger to the will made after the death of the testatrix tending to show that he procured a claim of indebtedness by her sons to the testatrix to be inserted by her in the will, are not binding on the contestees and are inadmissible under the hearsay rule.—*Hopper v. Sellers*, 91 Kan. 876, 139 Pac. 365.

REFERENCES.

Declaration of legatee or devisee as to mental capacity of testator, admissibility of.—See note 9 Am. & Eng. Ann. Cas. 807. Proof of writings by subscribing witnesses, in general.—See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1940.

(4) **Declarations of testator.** In general.—Declarations made by the testator both before and after the execution of the will are alike

admissible.—*In re Miller's Estate*, 31 Utah 415, 88 Pac. 338, 343. The greater weight of authority favors the admission in evidence of the declarations of the decedent made after the execution of a will, as well as before, if made within a reasonable time prior to his death. Thus declarations tending to show affection toward the devisees in the will, with no change in feelings toward them, thereby indicating the improbability of a desire to revoke the instrument, when corroborated by direct evidence that, after the making of the declarations, the testator had no opportunity to withdraw the will from its place of deposit, or otherwise to come into possession of it, may be admitted for the purpose of having the court infer that the will had not been returned to the testator's possession, nor revoked.—*In re Miller's Will*, 49 Or. 452, 124 Am. St. Rep. 1051, 14 Ann. Cas. 277, 90 Pac. 1002, 1009. A testator can not impeach the validity of his will by any subsequent oral declarations, any more than can a maker of any other written instrument impeach its validity.—*Calkins' Estate v. Calkins*, 112 Cal. 296, 301, 44 Pac. 577. See also *Gwin v. Gwin*, 5 Ida. 271, 48 Pac. 295, 301. While the testator lives, the attorney drawing his will would not be allowed, without the consent of the testator, to testify as to communications made to him concerning it, or to the contents of the will itself; but after the testator's death, and when the will is presented for probate, the attorney may be allowed to testify as to directions given to him by the testator, so that it may appear whether the instrument presented for probate is, or is not, the will of the alleged testator.—*Estate of Dominici*, 151 Cal. 181, 90 Pac. 448, 450. See *In re Wax*, 106 Cal. 348, 39 Pac. 624; *Estate of Nelson*, 132 Cal. 187, 64 Pac. 294. Declarations of testator are admissible to show mental condition.—*In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130. Declarations of testator made before or after execution of will are not admissible to show testamentary intention or exercise of undue influence by others but may be admitted as bearing on his condition or state of mind.—*In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598. Declarations ten months prior to execution of will as to intended testamentary disposition held admissible as indicating testatrix's mental attitude toward her children, particularly contestant.—*In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598. Where the will is attacked for forgery, decedent's declarations may be admitted in evidence to show they were inconsistent with statements of fact in the will but not to show testamentary intent at variance with the will.—*In re Thomas's Estate*, 155 Cal. 488, 101 Pac. 798. Testator's disapproval of contestant's marriage held admissible though remote.—*In re Higgins's Estate*, 156 Cal. 257, 134 Am. St. Rep. 131, 104 Pac. 6. Evidence of personal differences between proponents and contestants, or either of them and testatrix, held admissible in so far as tending to show testatrix's state of mind with relation to children at times not too remote.—*In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598. On the contest of a will, where the sole issue is that of testamentary capacity,

the declarations of the testatrix are admissible, not as evidence of the truth of the statements therein contained, but merely as showing her state of mind and mental condition.—Estate of Chevallier, 159 Cal. 161, 113 Pac. 130. Declarations of the testator, made both before and after the execution of the will, tending to show his affection for his son, who was the contestant of the will as against a daughter to whom he had made a much larger bequest, were admissible, if limited by suitable instructions to their functions as showing friendliness to the son; and it was error to fail to so limit their application.—Estate of Lavinburg, 161 Cal. 536, 119 Pac. 915. Statements made by the testator shortly before his death that he wanted to give the contestant his property, and that the latter was his child, are admissible on the issues of insanity and adoption.—Estate of Jones, 166 Cal. 108, 135 Pac. 288.

REFERENCES.

Admissibility of the declarations of a testator to sustain, defeat, or aid in the construction of his alleged will.—See note 107 Am. St. Rep. 459-473. Antetestamentary declarations of a testator as evidence of undue influence in the making of a will.—See note 3 L. R. A. (N. S.) 749-753. Declarations of testator not made at time of execution of will, admissibility of, on question of undue influence.—See note 6 Am. & Eng. Ann. Cas. 608. Declaration of testator, admissibility of, upon issue of revocation of will which can not be found.—See note 3 Am. & Eng. Ann. Cas. 960. Declaration of testator to impeach or invalidate will.—See notes 3 Am. Dec. 395, 52 Am. Dec. 167, 62 Am. Dec. 80.

(5) *Jury as judges of weight of evidence.*—The weight to be given to the testimony of witnesses is solely for the jury, and it is not error to refuse to instruct the jury to give special weight or consideration to the testimony of any particular witness.—Huyck v. Rennie, 151 Cal. 411, 90 Pac. 929, 931. Where a codicil to a will is contested on the grounds of undue influence and fraud practiced by the sole beneficiary on the testatrix, the jury is not warranted, in the absence of any proof of the exercise of undue influence by the beneficiary, in finding that such influence had been exercised by him, merely from evidence that he had made a false and fraudulent statement to the testatrix, who was his mother, to the effect that that the contestant, who was another of her sons, had made an agreement to relinquish all interest in her estate.—Estate of Ricks, 160 Cal. 469, 117 Pac. 539. When once a plaintiff has adduced such evidence as if uncontradicted would justify and sustain a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury. If there be sufficient evidence to justify the presentation of the case to the jury and the jury fall into an error in weighing and deciding upon the evidence, the remedy then is by motion for a new trial.—Estate of Chevallier, 159 Cal. 161, 113 Pac. 130.

13. Evidence as to mental condition, testamentary capacity, etc.

(1) *In general.*—It does not necessarily follow that, because one was physically weak and frail, he was of unsound mind and memory at the time he executed his will.—*In re Hackett's Estate*, *Hackett v. Hackett*, 33 S. D. 208, 213, 145 N. W. 437. A testator can not be said to have been of unsound mind merely because of untidy habits of person and dress at home, a miserly disposition, and a lack of affection for his offspring.—*In re Hanson's Will*, 50 Utah 207, 167 Pac. 256. Mental incapacity can not be successfully predicated of a testator because of his intemperate habits, when it is not charged that he was under the influence of liquor when executing the will.—*Estate of Fraser*, *Fraser v. Lumbard*, 177 Cal. 266, 170 Pac. 601. A testator can not be said to have been mentally incompetent merely because of a habit of telling the same story repeatedly.—*Estate of Fraser*, *Fraser v. Lumbard*, 177 Cal. 266, 170 Pac. 601. The fact that a testator once disputed the word of a witness, testifying as to his mental condition, is no evidence that he was not of sound and disposing mind.—*Estate of Fraser*, *Fraser v. Lumbard*, 177 Cal. 266, 170 Pac. 601. Counsel are allowed wide latitude on both sides, in respect of the proof of the conduct, acts, and declarations of the testator, in a will contest on the ground of mental incompetency.—*Estate of Allen*, *Allen v. Elliott*, 177 Cal. 668, 689, 171 Pac. 686. Where a testatrix left, virtually, all her estate to a rich banker who had no claims upon her, excluding the infant child of an only and beloved son, whereas she had been tenderly attached to the grandchild, and such testatrix was in her last illness when making the will and suffering physical pain calculated to affect her mind, these facts are to be considered in passing upon her testamentary capacity.—*In re Williams' Estate*, *Williams v. Davis*, 52 Mont. 192, Ann. Cas. 1917E, 126, 156 Pac. 1087. A man who, when calling on a friend, sits in a corner staring in his direction, so that the friend does not know whether he is looking at him or over his shoulder at somebody else, and, upon being spoken to, sometimes answers and sometimes does not, gives indications of being mentally unbalanced.—*Estate of Martin*, 170 Cal. 657, 151 Pac. 138. A man who will slam the doors of the house throughout the night, stand on the street and stare vacantly for long periods, hide under the steps of his home and ramble in his conversation, gives indications of unsoundness of mind.—*Estate of Martin*, 170 Cal. 657, 151 Pac. 138. A man who will get up in the middle of the night and light all the gas jets in the house, and persist in relighting them when they are extinguished, gives manifestations which, considered with other peculiar manifestations, may tend to show mental unsoundness.—*Estate of Martin*, 170 Cal. 657, 151 Pac. 138. A man who lives with his wife on fair conjugal terms for nearly fifty years, during which they bring up a family in comfortable circumstances; then parts from her in apparently good feeling on starting for a business trip to a distant city, and thereafter declines to come near her again, and takes on an unaccountable antipathy for

her, so that the mention of her name or a sight of her picture throws him into a state of violent agitation, gives evidence of being unbalanced in mind.—Estate of Martin, 170 Cal. 657, 151 Pac. 138. Personal habits, general behavior, eccentricities, age, physical infirmities, and other peculiarities are all properly to be considered in testing the mental competency of a testator; but the fact of incompetency is not to be arrived at through consideration of any of these matters singly, but only in a general way.—In re Hansen's Will (Utah), 177 Pac. 982. A man who has been notable among his acquaintances for the care bestowed by him upon his personal appearance, and who changes suddenly in this respect and becomes slovenly in person and attire, even to the extent of wearing conspicuously a spinal brace that is intended to be concealed under his clothing, betrays signs of being a paranoiac.—Estate of Martin, 170 Cal. 657, 151 Pac. 138. In a contest over the probate of a will, the court should not give an instruction that emphasizes one of the facts, among others, which tend to prove or disprove an ultimate fact in issue, thus, the court properly refused a requested instruction that, because a testatrix had previously executed similar wills and was then of sound mind, such fact did not necessarily establish her sanity when executing the will in controversy.—In re Clark's Estate, Appeal of O'Barn (Cal.), 181 Pac. 639, 641. The measure of mental competency for a testator is defined in the following cases: Estate of Motz, 136 Cal. 558, 69 Pac. 294; Estate of Morey, 147 Cal. 495, 82 Pac. 57; Estate of Huston, 163 Cal. 166, 124 Pac. 852; Estate of Purcell, 164 Cal. 300, 128 Pac. 932.—Estate of Fraser, Fraser v. Lombard, 177 Cal. 266, 170 Pac. 601. On a contest of the probate of a will, the evidence is held sufficient to support the conclusion of mental incompetency of the testatrix at the date of the execution of the alleged will.—Estate of Huston, 163 Cal. 166, 124 Pac. 852.

(2) **Presumption.**—The presumption is that the maker of a will was sane, unless previous incompetency is sufficiently shown to overcome such presumption.—Wood v. Wood, 25 Wyo. 26, 37, 164 Pac. 844. Sanity is presumed and burden on contestant to show incapacity by satisfactory evidence.—In re Weber's Estate, 15 Cal. App. 224, 114 Pac. 597. No presumption of insanity arises from a testator's making in his will no provision for his children.—Estate of Martin, 170 Cal. 657, 151 Pac. 138. The law presumes that every person is of sound mind until the contrary is proved.—Estate of Martin, 170 Cal. 657, 151 Pac. 138.

(3) **Manner of disposing of property.**—If a testator was of sound and disposing mind, and a jury believes from the evidence that he was, the fact that the disposition by will was not such as the jury approves must not affect the verdict.—In re Hansen's Will, 50 Utah 207, 167 Pac. 256. A testator is not mentally incompetent because he entertains notions contrary to fact as to his children and others, or because he is eccentric as to his money, and the disposition he

ought to make of it.—*In re Hansen's Will* (Utah), 177 Pac. 982. As to whether a testator's disposition of his property is evidence in itself of testamentary incapacity, all the circumstances of his relations with his family being considered, is a question for a jury to determine.—*Estate of Martin*, 170 Cal. 657, 151 Pac. 138.

(4) On issue of mental incompetency, insanity, etc.—The wife's knowledge and observation of the husband's habits and mental condition, after a divorce granted, renders her competent to express an opinion as to his sanity.—*In re Van Alstine's Estate*, 26 Utah 193, 72 Pac. 942, 943. Where the contention of the contestant was that the testatrix was the victim of hereditary insanity, and that the taint was in her blood from her mother's and father's people, it is perfectly proper to put before the jury the fact that the testatrix's immediate paternal progenitor was not only sane, but of exceptional mental power, and had borne a part in the active affairs of business life. It will not be presumed that a child inherits the insane and not the sane tendencies of his family.—*Estate of Dolbeer*, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695, 704; *Estate of Redfield*, 116 Cal. 637, 48 Pac. 794. Evidence as to incapacity and insane delusions, examined and held insufficient to show want of testamentary capacity.—See *Skinner v. Lewis*, 40 Or. 571, 67 Pac. 951, 953. The verdict of a coroner's jury is not admissible in evidence upon the issue of the sanity of the testator.—*Hollister v. Cordoro*, 76 Cal. 649, 18 Pac. 855; *Rowe v. Such*, 124 Cal. 576, 66 Pac. 862, 67 Pac. 760; *Oppenheim v. Cluny*, 142 Cal. 313, 75 Pac. 899; *Estate of Dolbeer*, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695, 704. It is held in this contest to the probate of a will that the evidence was sufficient to justify the verdict upon the issue of unsoundness of mind.—*Estate of Strachan*, 166 Cal. 162, 135 Pac. 296. On this contest of the probate of a will the evidence properly admitted is held amply sufficient to sustain the findings of the court both that the testatrix did not have the sound and disposing mind and memory essential to the making of a last will and that the instrument offered for probate was the result of undue influence.—*Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307. Where a will was contested on the grounds of mental incompetency and undue influence, evidence that a few minutes after he had executed the will, the testator returned to the office of the person who had drafted it, in an apparently nervous condition and in a state of physical collapse, and of statements then made by him to the effect that matters would have been extremely uncomfortable at his home if the will had not been executed, was competent solely upon the issue as to testator's mental condition and was incompetent to prove the undue influence, and an instruction so limiting its effect was properly given.—*Estate of Gleason*, 164 Cal. 756, 130 Pac. 872. In a contest on the ground of insanity it was proper for the court to refuse to permit the proponents to establish the fact of the testator's sanity at a date three years prior to the time when his competency was attacked by the contestants. In the absence of evidence to the contrary, his sanity

during such prior period was presumed, and the proponents had the benefit of the presumption.—*Estate of Loveland*, 162 Cal. 595, 123 Pac. 801. It is held that while there was no direct evidence contrary to the testimony of the persons present at the time of the execution of the will that the testator was then of sound and disposing mind, there was, however, substantial evidence on which to found two distinct theories, upon either of which the jury might have reached the conclusion that unsoundness of mind existed at the time of the execution of the will, namely, evidence tending to show gradual increasing dementia ever present though not always manifest, and evidence tending to show insanity which manifested itself by recent attacks with fairly lucid intervals between.—*Estate of Jones*, 166 Cal. 108, 135 Pac. 288. On the contest of the probate of a will the evidence held sufficient to support the conclusion of mental incompetency.—*Estate of Huston*, 163 Cal. 166, 124 Pac. 852. A verdict in a will contest is advisory only. It does not necessarily follow, because a testatrix is physically weak and frail, that she is of unsound mind and memory.—*In re Hackett's Estate*, 33 S. D. 208, 145 N. W. 437, 438. Evidence held insufficient to show mental incapacity.—*In re Weber's Estate*, 15 Cal. App. 224, 114 Pac. 597.

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Presumptions arising when partial insanity has been shown.—See note 41 *Am. Rep.* 686, 688. Opinion of subscribing witnesses to will as to sanity or insanity of the testator.—See note 39 *L. R. A.* 715-722.

(5) *Insane delusions*.—If a testator against all evidence and probability, believed supposed facts respecting his children, which had no existence except in his perverted imagination, and conducted himself, however logically, upon the assumption of their existence, he is, so far as such facts are concerned, under an insane delusion; and if he was the victim of such a delusion when he executed his will cutting off his children with one dollar each, and if the provisions of the will were caused by such delusion, the instrument is not his will, and its probate may be contested by such children for the mental unsoundness of the testator.—*Estate of Riordan*, 13 Cal. App. 313, 109 Pac. 629. An "insane delusion" can exist, in respect to a testator alleged to entertain it, only in case there is absolutely no basis for such a conception.—*In re Hansen's Will* (Utah), 177 Pac. 982. One who would show mental incapacity, in a testator, because of his entertaining delusions, must show that the matters indulged in mentally, referred to as delusions, had no basis of fact, of the least sort.—*Estate of Allen*, *Allen v. Elliott*, 177 Cal. 668, 687, 171 Pac. 686. One, who attacks a will on the ground that the testator when making it was under an insane delusion that his relatives were striving to get all his property from him, must prove that the delusion had no basis in fact, reason, or probability.—*Edwardson v. Gerwien* (N. D.), 171 N. W. 101, 103. Evidence showing only cruelty, harshness, and ungovernable temper, held insufficient to show insane delusion as to children.—*In re Riordan's*

Estate, 13 Cal. App. 313, 109 Pac. 629. If the parties who are contesting the probate of a will, swear falsely that they never knew of the testator's having delusions, it destroys the probative force of other testimony given by them.—*Johnson v. Shaver* (S. D.), 172 N. W. 676, 681.

(6) **Suicide. Effect of, as evidence.**—It is not a man's conduct or appearance, at the time of the execution of his will, that determines his testamentary capacity. These indications must be considered in connection with all of the circumstances leading up to that time, in order that a proper estimate may be made of his mental capabilities, and of the influences, if any, that prompted his testamentary action. The fact of suicide is, in itself, at times, sufficient to raise serious doubt of the decedent's sanity. Where this fact exists, and other circumstances tending to raise a doubt as to the sanity of the testator, are given in evidence, it is proper to consider all such evidence in determining the question at issue.—*Rathjens v. Merrill*, 38 Wash. 442, 107 Am. St. Rep. 880, 80 Pac. 754, 756. Upon the issue of insanity, the fact that the testator committed suicide, is to be taken into consideration like any other fact in the case.—*Estate of Dolbeer*, 149 Cal. 227, 252, 9 Ann. Cas. 795, 86 Pac. 695. Suicide is properly considered, but is not of itself proof of insanity or incapacity.—*In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130. It was immaterial what amount had been taken by a suicide testatrix charged with theft, the only issue being her sanity.—*In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130.

(7) **Testimony of "intimate acquaintances."**—Friends of a testatrix, who had known her for twenty years, some for a longer period, and who were on terms of social intimacy with her, and had seen and conversed with her immediately before and after the execution of the will, are "intimate acquaintances," under any definition of that term, as employed in the statute.—*Estate of McKenna*, 143 Cal. 580, 583, 77 Pac. 461. The testimony of intimate acquaintances of the deceased, concerning his unsoundness of mind, must be given with the reasons upon which it is based, and the opinion itself can have no weight other than that which the reasons bring to its support.—*Estate of Dolbeer*, 149 Cal. 227, 236, 9 Ann. Cas. 795, 86 Pac. 695, 699. A determination of the fact as to what constitutes an "intimate acquaintance," under the statute, must be committed to the discretion of the trial court, and the appellate court will not interfere with the exercise of that discretion, unless there has been a clear abuse of it.—*Estate of McKenna*, 143 Cal. 580, 77 Pac. 461, 462. Where the testimony of witnesses is preceded by proof as to the intimacy required by the statute, and is accompanied by the reasons for their opinions, the objection to the testimony given as to the condition of mind of the testator, as relating to a time too remote from that of the execution of the will, is not tenable, where it appears that the disease causing his insanity was a progressive one.—*Estate of Dalrymple*, 67 Cal. 444, 7 Pac. 906. An "intimate acquaintance" is allowed to give his opinion merely because he had exceptional opportunities

for observing the mental condition of the person in question. The result of his observation can not be given adequate expression except in the form of an opinion.—*Huyck v. Rennie*, 151 Cal. 411, 90 Pac. 929, 931. While the appellate court will not interfere as to the determination of the question, whether a witness was an "intimate acquaintance," within the meaning of the code, unless there has been an abuse of the discretion of the trial court; on the other hand, the exclusion of testimony, which was evidently material and important, and might probably have changed the result, and which was within the range of legal evidence, is ground for reversal.—*Estate of Carpenter*, 79 Cal. 382, 21 Pac. 835, 836.

(8) *Testimony of "casual observers."*—"Casual observers," or those who have had only limited opportunities of observing the habits and mental peculiarities of the testator, are not competent to give any testimony and opinions as to his mental capacity.—*Heirs of Clark v. Ellis*, 9 Or. 128, 140. Notwithstanding the evidence shows that a testator had gross habits of indulgence in intoxicating liquors, a verdict based on the theory that he was of unsound mind at the date of the execution of the will, by reason of alcoholic dementia, is not sustained by the evidence, when the attorney who drew the will and the attesting witnesses each positively testified that he was possessed of testamentary capacity when he signed the will, and the only evidence to the contrary was that of physicians whose testimony was largely speculative and founded entirely upon knowledge gained subsequent to the date of the will, and of other witnesses whose testimony as to his condition when they saw him at other times was just as consistent with the theory of temporary drunkenness as of permanent mental derangement.—*Estate of Carithers*, 156 Cal. 422, 105 Pac. 127.

(9) *Expert witnesses.*—Evidence of medical experts, although skilled alienists, coming from persons who have never seen the testator, and who base their opinions upon the facts given in hypothetical questions, which eliminate from consideration all countervailing evidence, is evidence of the weakest and most unsatisfactory kind.—*Estate of Dolbeer*, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695, 702. In a contest of a will where the sole ground is want of mental capacity to make a will, the granting of the motion for nonsuit was not made erroneous by the mere fact that a physician, in answer to a hypothetical question, expressed his belief that the testatrix was insane, from a medical standpoint, there being no other evidence showing the extent or nature of the insanity.—*Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130. In a will contest where the ground is the testator's mental incapacity, it is not enough for a witness to testify that he considered the testator to be "mentally weak"; he must give satisfactory reasons on which he bases the opinion.—*Estate of Fraser*, *Fraser v. Lumbard*, 177 Cal. 266, 170 Pac. 601.

(10) **Physician as witness.**—The rule as to the competency of an attorney to give testimony, after the death of the testator, is applicable also to physicians. And it has been held, under a Colorado statute, that, when the dispute is between the devisees and heirs at law, all claiming under the deceased, either as devisees or heirs, may call the attending physician as a witness.—*In re Shapter's Estate*, 35 Colo. 578, 117 Am. St. Rep. 216, 6 L. R. A. (N. S.) 575, 85 Pac. 688, 691. See *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510. A general practitioner, who has had experience in the various kinds of mental cases, is as competent to testify as to the sanity or insanity, as the skilled expert who devotes his entire time to the study of mental diseases.—*Estate of Dolbeer*, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695, 704. Where physicians were in attendance upon the testator before his death, and had an opportunity to observe and know the mental condition of the deceased, and all concurred in giving testimony to the effect that the deceased was utterly lacking in testamentary capacity at the time they examined him, the testimony of such witnesses is entitled to great consideration, where, aside from their experience and personal knowledge of the subject, they were wholly disinterested witnesses.—*Hartley v. Lord*, 38 Wash. 221, 80 Pac. 433, 434. An attending physician, who had treated a testator professionally at a sanitarium continuously for thirteen days prior to his death and who during that period had diagnosed his case and observed his actions, conduct, and demeanor, but who was not called as an expert, is properly restrained on a contest of his will, from testifying to the physical and mental condition of the testator at the time of the date of his will executed during such period, notwithstanding it was not directly shown, by preliminary inquiries, that all the information he had obtained on such matters was acquired while attending the testator in his professional capacity and was necessary to enable him to prescribe or act for his patient.—*Estate of Budan*, 156 Cal. 230, 104 Pac. 442.

(11) **Non-experts.**—In an action in which the validity of a will is involved, testimony of non-experts is admissible, as a rule of necessity, as to certain indicia of mental disorder, such as peculiar conduct, acts, and deportment of the person, which create a fixed and reliable judgment in the mind of the observer, but which can not be conveyed in words to the jury. For example, a person may appear to be sad, dejected, sick, or well, yet such appearances could not be described satisfactorily, and hence a conclusion is permitted to be given.—*Zirkle v. Leonard*, 61 Kan. 636, 60 Pac. 318. In a proceeding wherein the probate of a will was contested, the children of the testatrix were about evenly divided in testifying, pro and con, as to her testamentary capacity; and it was held that non-expert opinions of this character should have but little if any weight, except in so far as they are based on the surrounding facts and circumstances warranting such opinions.

—In *re Hackett's Estate*, *Hackett v. Hackett*, 33 S. D. 208, 214, 145 N. W. 437.

(12) *Wife's testimony as to husband.*—Upon the trial of a contest over the probate of a will, the wife of the testator may testify, of her own knowledge, of her deceased husband's habits and mental condition obtained by observation, and not from anything communicated to her in confidence by her husband. For example, on the issue that the husband was habitually intemperate, if the wife is asked the question: "What was the condition that he was in when he was under the influence of liquor?" she may testify, and the question is not within the prohibitive clause of the statute.—In *re Van Alstine's Estate*, 26 Utah 193, 72 Pac. 942, 943.

14. Evidence as to undue influence.

(1) *In general. Pleading.*—The soundness of mind of a testator does not imply immunity from undue influence, although it may require greater ingenuity to unduly influence a person of sound mind and body, and more evidence may be required to show that such a person was overcome than in the case of one weak of body and mind.—*Estate of Olson*, 19 Cal. App. 379, 126-Pac. 171. Courts have neither the right nor the power to overthrow a will on the ground of undue influence, in the absence of direct and substantial proof bringing the case within those well-established rules of law which define undue influence, and prescribe the extent to which the evidence in any given case must go in order to measure up to the requirements of such definition.—*Estate of Hodgdon*, 23 Cal. App. 415, 138 Pac. 111. Where opinion evidence, given by outside persons, is at a balance as to the testamentary capacity of a testator, testimony as to the same given by the subscribing witnesses is final.—In *re Sturtevant's Estate*, *Sturtevant v. Sturtevant*, 92 Or. 269, 178 Pac. 192, 180 Pac. 595. If, in the contest of the probate of a will on the ground of undue influence, the testator is proved to have been aged, feeble, blind, and unable to read and write, sick, confined to bed, somewhat weak-minded, and lacking in mental capacity to execute a will, it may, in the absence of any attempt to prove that the testator was not of sound and disposing mind and memory when he executed the will in question, be shown in rebuttal that, more than three years before, at which time a prior will was made by such testator, the latter was mentally capable.—*Ekern v. Erickson*, 37 S. D. 300, 308, 157 N. W. 1062. If undue influence is not established in respect to the execution of a codicil which ratifies and confirms a will previously made, evidence is immaterial that is produced to show undue influence in respect to the execution of the will itself.—*Estate of Baird*, 176 Cal. 381, 168 Pac. 561. Where the former wife of the testator testified as to the mental condition of the testator about the time the will was executed, the court properly sustained an objection on cross-examination to her opinion as to whether or not the testator was easily influenced.—*Estate of Lavinburg*, 161 Cal. 536,

119 Pac. 915. Question whether testatrix was "easily influenced" held objectionable as calling for conclusion.—*In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598. Where the contestees offered evidence to show that the testator believed his son, the contestant, to be wealthy, he was entitled to state in rebuttal that he had never stated to the testator that he was wealthy, but was not entitled to show in rebuttal that he was in fact poor, the only issue being as to the testator's belief as to his wealth.—*Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915. Where a petition specifically attacked the will on the ground that it was not properly attested and that it was executed by reason of the beneficiary's undue influence, testamentary capacity and actual execution are admitted and it is not necessary for proponents to reprobate the will with regard thereto.—*Simpson v. Durbin*, 68 Or. 518, 136 Pac. 349. Upon a contest of the probate of a will in favor of a husband forty-three years of age made to him by his wife sixty-three years of age, based upon the charge of undue influence exercised by him over his wife to obtain her will to him of all of her property, worth \$20,000, to the exclusion of her five children and three grandchildren, the contestants are not required to allege the mental or physical weakness or want of mental capacity of the testatrix nor that she was acting under menace, duress, or fraud. None of such allegations is necessary to establish the charge of undue influence.—*Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171.

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Undue influence defined.—See *supra*, subd. 9 (3).

(2) *Presumption*.—Undue influence upon a testator is never presumed, but must be proved like any other fact.—*In re Dale's Estate*, *Tobias v. Mathews*, 92 Or. 57, 179 Pac. 274. The fact that a will is written by a daughter of the testator who is named as the executrix but is not otherwise favored over the other children does not raise a presumption of undue influence.—*Sellards v. Kirby*, 82 Kan. 291, 136 Am. St. Rep. 110, 20 Ann. Cas. 214, 28 L. R. A. (N. S.) 270, 108 Pac. 73. Testimony that a beneficiary under a will was in the house of the testator shortly after the will was executed does not bear out the assertion that such beneficiary was present when the will was made, nor is such testimony sufficient to raise a presumption of undue influence.—*In re Packer's Estate*, 164 Cal. 525, 129 Pac. 778, 779. The mere fact that a person is named as executor and trustee of a will is not sufficient to raise a presumption of undue influence.—*Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762. The fact that the sole beneficiary of a will was the son and business manager of the testatrix does not create a presumption that he abused such relation by unduly influencing the making of the will in his favor.—*Estate of Ricks*, 160 Cal. 468, 117 Pac. 539. Evidence that the testator consulted attorney and acted advisedly in making will held sufficient to overcome presumption of undue influence from confidential relation between testator and child

who was chief beneficiary.—*In re Higgins's Estate*, 156 Cal. 257, 104 Pac. 6.

(3) *Inferences*.—Though influence is not sufficient to avoid will unless it bears directly on testamentary act, proof is sufficient if such as to warrant inference that will was direct result of influence exerted to procure it, and was not natural result of uncontrolled will of testator.—*In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598. The testator and the beneficiary under the will may have been friends, and the latter may have shown the former neighborly kindnesses and have transacted business for him, but undue influence is not to be inferred therefrom.—*Estate of Carey*, 56 Colo. 77, 903, Ann. Cas. 1915B, 951, 51 L. R. A. (N. S.) 927, 136 Pac. 1175. Undue influence can rarely be established by direct proof; but, while provable by facts and circumstances, it can not be merely inference.—*In re Hanson's Will*, 50 Utah 207, 167 Pac. 256. In a contest of a will which contained a statement that the testatrix had paid to each of her children and grandchildren his or her full share of the property, it was held that this statement would not be presumed to be true, so as to rebut any inference of unfairness or undue influence, although this statement was not denied in the grounds of contest.—*Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171. In trying an issue of undue influence alleged to have been exerted by the beneficiaries upon the testator in the making of his will, every fact from which the inference might be legitimately drawn that such influence had or had not been exerted, or, if exerted, that it had or had not been effective, is admissible provided the time of its exertion is not so remote that no effect can reasonably be attributed to it, and that such evidence tends to show that the effect of the influence was operative upon the mind and will of the testator when he executed the instrument.—*Welch v. Barnett*, 34 Okla. 166, 125 Pac. 473. The relation existing between a beneficiary and the testatrix was confidential in the same sense and to the same extent that the relation of husband and wife living together in harmony is always confidential, but was of itself and in the absence of other evidence tending to show undue influence, insufficient to raise an inference of such influence, or to impose upon the beneficiary the burden of showing its absence, or in the absence of such showing by him to warrant setting the will aside.—*Estate of Morcel*, 162 Cal. 188, 121 Pac. 733.

(4) *Direct testimony*.—Undue influence, exercised upon a testator, is frequently incapable of being proved by direct testimony; in such cases, resort may be had to circumstantial evidence.—*In re Dale's Estate*, *Tobias v. Mathews*, 92 Or. 57, 179 Pac. 274.

(5) *Circumstantial evidence*.—The existence of undue influence may be shown by circumstantial evidence, but such evidence must do more than raise a suspicion. It must amount to proof, and has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged

testator.—Estate of Kilborn, 162 Cal. 4, 120 Pac. 762. Upon the contest of a will for undue influence, evidence must show that pressure was brought to bear upon the testamentary act. Though that pressure may be shown by circumstantial evidence, it must do more than raise mere suspicion; but must amount to proof of circumstances inconsistent with the claim that the will was the spontaneous act of the alleged testator. Where no adverse circumstances appear which extend beyond suspicion, and yet they are not inconsistent with other circumstances showing that the will was the voluntary act of the testator taken under the independent advice of an attorney, the presumption is, in the absence of inconsistent proof, in favor of the will, and the circumstances shown do not justify a verdict against its validity.—Estate of Lavinburg, 161 Cal. 536, 119 Pac. 915. Proof, merely, that confidential relations existed between a testator and the main beneficiary under his will is not sufficient to destroy its validity, but there must be some proof, in addition to the relation of facts or circumstances showing the use of that relation at the time the will was made overcoming the free will and desires of the testator, in order to invalidate the testament.—Estate of Ricks, 160 Cal. 450, 117 Pac. 532. The mere fact that a beneficiary went with the testatrix to the office of a lawyer, where she executed the will, and was present while she gave her directions as to its provisions, and while she executed it, is a circumstance to be taken into consideration in determining whether there was undue influence, but in the absence of other evidence tending to show it, is insufficient to raise any inference of such influence.—Estate of Morcel, 162 Cal. 188, 121 Pac. 733. A mere suspicion that undue influence may have been used is not sufficient to warrant the setting aside of a will on that ground. The evidence must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the testator.—Estate of Morcel, 162 Cal. 188, 121 Pac. 733. Undue influence may be proved by circumstantial evidence; it may be inferred from surrounding circumstances, taken in connection with statements made by the person alleged to have exercised such influence, and who is a beneficiary under the will.—*Ekern v. Erickson*, 37 S. D. 300, 312, 157 N. W. 1062. A charge of undue influence is substantially one of fraud and can seldom be shown by direct and positive evidence, and a court should be liberal in admitting evidence of all circumstances which may tend to throw light upon the relations of the parties and upon the disputed questions of undue influence.—*Lehman v. Lindenmeyer*, 48 Colo. 305, 109 Pac. 959. In a contest of a will by a disinherited natural daughter of the testatrix, on the ground of the alleged undue influence of a man who was the main beneficiary, and with whom, although unmarried to him, the testatrix had affectionately lived as a wife for upward of thirty years, it is held that there is nothing in the provisions of such will to raise even a suspicion of improper influence, or to impose upon such bene-

fiary the burden of showing that he had not used undue influence to procure its execution, in view of the admitted circumstances that the daughter and the testatrix had been practical strangers for the first forty-seven years of the former's life, and had been on unfriendly terms for a period long antedating the making of the will and extending to the time of the death of the testatrix.—*Estate of Morcel*, 162 Cal. 188, 121 Pac. 733. The existence of a confidential relation between a testator and a beneficiary charged with undue influence upon the former in the preparation of his will does not, of itself, create a presumption of undue influence, but it is a circumstance which, taken in connection with other suspicious circumstances, may justify such an inference of undue influence as to put the burden upon the beneficiary of showing that no such influence was exerted.—*In re Dale's Estate*, *Tobias v. Mathews*, 92 Or. 57, 179 Pac. 274. Where the evidence showed that the husband of the testatrix accompanied her to the attorney's office at the time the will was prepared, and remained in the office within view of, and in a position so that he could see, the parties in the execution of the will, this circumstance was pertinent and of probative force, to be considered in connection with the other circumstances as to whether he exercised undue influence over her.—*Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171.

(6) *Opportunity*.—Power, motive, and opportunity to exercise undue influence do not alone authorize the inference that such influence has in fact been exercised.—*Ginter v. Ginter*, 79 Kan. 721, 22 L. R. A. (N. S.) 1024, 101 Pac. 635. Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act.—*Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762.

(7) *Confidential relation*.—The fact that the confidential relation of attorney and agent existed between a testatrix and the one charged with procuring the will by undue influence does not in itself prove that the will was procured by undue influence arising from that relation, nor cast upon him the burden of proving the absence of such influence at the time of its execution.—*In re Purcell's Estate*, 164 Cal. 300, 128 Pac. 932, 934. The mere existence of a confidential relation between the testator and his daughter, who is the contestee, is not enough, when taken alone, to raise the presumption of undue influence on her part upon the testator; but there must be some proof, in addition to such relation, of facts and circumstances showing the use of that relation, at the time the will was made, overcoming the free will and desire of the testator, in order to invalidate the will as to the daughter.—*Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915. It is held that the trust relation between the testator and his daughter was more nominal than real; that he always had control of his property, and that the trust relation amounted to nothing, in view of the fact that the testator had independent advice, and acted in the absence of his

trustee in the preparation of his will, and that any presumption that could arise from the trust relation was fully met and overthrown by the uncontradicted evidence showing the actual circumstances surrounding the preparation and execution of the will.—*Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915. The statute of Kansas, requiring certain affirmative proof to establish the validity of a will written or prepared by a person occupying a confidential relation to the testator and who is the sole or principal beneficiary in the will, applies to the single case of a will written or prepared by such a person who receives the whole or the most considerable portion of the estate devised. The statute can not be interpreted as if it read "the sole or one of the principal beneficiaries in the will."—*Kelly v. Burgess*, 84 Kan. 29, 115 Pac. 583.

(8) *Privileged communications.*—It was held in the contest of a will for undue influence that the testimony of a physician who had obtained all his information while attending the decedent professionally was inadmissible under the rule of privileged communications.—*Auld v. Cathro*, 20 N. D. 461, 128 N. W. 1025.

(9) *Of undue influence. Must show what.*—To invalidate a will on the ground of undue influence, there must be affirmative evidence of the facts from which such influence is to be inferred. It is not sufficient to show that the party benefited by the will had the motive and opportunity to exert such influence; there must be evidence that he did exert such influence and so control the actions of the testator, either by importunities which the testator could not resist, or that by deception, fraud, or other improper means, the instrument is not really the will of the testator.—*Hubbard v. Hubbard*, 7 Or. 42, 47. Evidence that one of the residuary legatees, who would receive part of the estate by a provision in his favor, drew the will; that he had been, for a long time before, the attorney for the testator; and that the testator, when he made the will, was old, feeble, and suffering from disease; is sufficient to raise a technical implication or presumption that the will was procured by undue influence, or would, at least, require the proponents to show what did actually occur at the time of its execution and prior thereto, so that the presence or absence of undue influence may be determined; but such presumption does not create a conflict of evidence, upon which it is necessary to allow the jury to decide.—*Estate of Morey*, 147 Cal. 495, 82 Pac. 57, 62. Where it appears that the testator was of sound mind at the time of making his will, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that such circumstances are inconsistent with a contrary hypothesis; that such influence was present and operated on the testator's mind at the time he executed his will.—*Gwin v. Gwin*, 5 Ida. 271, 48 Pac. 295, 300. As to what is sufficient proof to establish undue influence must depend on the facts and circumstances of each particular case. The only positive and

affirmative proof required is of facts and circumstances from which the undue influence may be reasonably inferred.—*Blackman v. Edsall*, 17 Colo. App. 429, 68 Pac. 790, 793. In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such undue influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will is not the expression of his own desires. The external facts constituting the exercise of undue influence must be established by other evidence than the declarations of the testator. His declarations are incompetent to show either that the influence was exercised, or that it affected his actions, and are inadmissible, except as they may illustrate his mental state, and give a picture of the condition of his mind contemporaneous with the declarations themselves.—*Estate of Gleason*, 164 Cal. 756, 130 Pac. 872. If a will is offered for probate, but is contested on the ground of undue influence exercised by the contestee over the testator, the undue influence that will warrant the court in setting the will aside must be proved to have been such as destroyed free agency and thereby substituted the will of another for that of the testator.—*Cook v. Bolduc*, 24 Wyo. 281, 291, 157 Pac. 580, 158 Pac. 266. In order to establish undue influence, invalidating a will, there must be an actual showing of that sort of pressure which, at the very moment of execution, overpowered the mind of the testator and mastered his volition.—*Estate of Baird*, 176 Cal. 381, 168 Pac. 561. There must be proof of pressure overpowering mind and bearing down volition at very time will was made.—*In re Carother's Estate*, 156 Cal. 422, 105 Pac. 127. Upon the contest of a will for undue influence, evidence must show that pressure was brought to bear upon the testamentary act. Though that pressure may be shown by circumstantial evidence, it must do more than raise mere suspicion; but must amount to proof of circumstances inconsistent with the claim that the will was the spontaneous act of the alleged testator. Where no adverse circumstances appear which extend beyond suspicion, and they are not inconsistent with other circumstances showing that the will was the voluntary act of the testator taken under the independent advice of an attorney, the presumption is in favor of the will.—*Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915. Mere persuasion on the part of a beneficiary will not overcome the will of a party if it appears that it is his will. It is not influence alone, but an undue influence which has been defined to be such an influence as deprived the party of the free exercise of his intellectual powers, an influence which is exercised by coercion, imposition or fraud; an influence which impels the testator to act in fear, a desire for peace, or some feeling which he is unable to restrain.—*In re Tresidder's Estate*, 70 Wash. 15, 125 Pac. 1035; *In re Miller's Estate*, 36 Utah 228, 102 Pac. 997. Evidence of actual attempt by declarations and conduct of one beneficiary to influence testatrix against others held not inadmissible under rule excluding as against other beneficiaries admissions of one as to undue influence.—*In re*

Snowball's Estate, 157 Cal. 301, 107 Pac. 598. In order to avoid a will on the ground of undue influence, there must be substantial proof of pressure overpowering the volition of the testator. Such proof must raise more than suspicion.—Estate of De Laveaga, 165 Cal. 607, 133 Pac. 307. A duly executed will can not be set aside on the ground of undue influence, unless there be proof of a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made.—Estate of Gleason, 164 Cal. 756, 130 Pac. 872; Estate of Hodgdon, 23 Cal. App. 415, 138 Pac. 111.

10. Unnatural will.—Though unjust will does not of itself raise presumption of undue influence, nature of will may be considered as a circumstance together with value of estate.—In re Snowball's Estate, 157 Cal. 301, 107 Pac. 598. While the inequitable character of a will may be considered, if linked with other evidence tending to show undue influence, the court should not permit a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper.—Estate of Kilborn, 162 Cal. 4, 120 Pac. 762. Where, under a will, the bulk of the estate is left to the widow, and but a small provision is made for a daughter who is an only child, and the evidence shows that the testator lived happily with his wife for nearly forty years, the daughter, if she would prove undue influence to have been practiced by her mother, must make out a very strong case, where she herself had done much to disappoint and grieve her parents by her conduct and enforced marriage.—Estate of Stone, 172 Cal. 215, 155 Pac. 992. The fact that a testatrix leaves her estate to two of her sons, to the exclusion of a third, does not indicate that such disposition was the effect of undue influence.—Estate of Ricks, 160 Cal. 450, 117 Pac. 532. Held natural to dispose of property to relatives with whom testator had lived for many years as against children who did not care for testator.—In re Riordan's Estate, 13 Cal. App. 313, 109 Pac. 629. The influence which a child acquires over a parent by kind, dutiful, and affectionate behavior as compared with that of its brothers and sisters and as a consequence whereof the parent leaves it by will a much larger share of the property than is left to the others is not undue influence within contemplation of the law.—Converse v. Mix, 63 Wash. 318, 115 Pac. 306. Where testator left his property to a warm personal friend, to the exclusion of a brother whom he had not seen for forty years and who, he stated, had done him a great wrong, held there was no evidence that the friend had unduly influenced the making of the will.—In re Carey's Estate, 56 Colo. 77, 51 L. R. A. (N. S.) 927, 136 Pac. 1179. A will may appear to be unnatural, also expressions of the testator therein, as to his intentions concerning the natural objects of his bounty, may so appear, but undue influence is not indicated thereby.—Estate of Baird, 176 Cal. 381, 168 Pac. 561.

(11) Competent witnesses.—A legatee under a will is a competent witness to testify on behalf of contestants of the probate thereof as to undue influence exerted over the testator; the interest in the subject
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of the action which disqualifies, must be a financial one, and adverse to the interest of the objecting party; the legatee's interest is not such a one, as he is in no event entitled to share in the estate unless the will is upheld.—*Ekern v. Erickson*, 37 S. D. 300, 311, 157 N. W. 1062. In a contest over the probate of a will, on the ground of undue influence, beneficiaries of the will, charged with having exerted the influence, are incompetent to testify even negatively as to the transaction.—*Ekern v. Erickson*, 37 S. D. 300, 312, 157 N. W. 1062. In a contest over the probate of a will, the widow of a deceased heir of the testator, is not incompetent, on the ground of her supposed interest in the subject of the action, to testify as to undue influence, even though she may, as guardian of her minor children, have been originally a co-contestant.—*Ekern v. Erickson*, 37 S. D. 300, 310, 157 N. W. 1062. In a contest over the probate of a will, the husband of one of the contesting heirs is, if the property involved is not their homestead, competent to testify as to undue influence exercised over the testator by certain legatees; such witness does not have "any interest in the subject of the action."—*Ekern v. Erickson*, 37 S. D. 300, 309, 157 N. W. 1062. Where a testator made statements expressive of a testamentary purpose, inconsistent with the terms of his will, afterwards contested, the testimony of third persons as to such statements is, in connection with other evidence, competent and relevant, as tending to show susceptibility to undue influence, though it is not competent to prove acts of undue influence.—*Ekern v. Erickson*, 37 S. D. 300, 312, 157 N. W. 1062.

(12) *Competency of evidence.*—It is held that evidence as to domestic troubles and unhappy married life of the testator with his second wife was competent evidence, in view of an offer of the contestant to show that the daughter, as contestee, took advantage of her father's distress, in bringing about the execution of his will in her favor, to the detriment of the contestant.—*Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915. Competency of evidence in a married daughter's contest of the will of her mother to show antipathy of the testatrix toward the daughter's husband.—*In re Dale's Estate*, *Tobias v. Mathews* (Or.), 179 Pac. 274. In the contest of a will on the ground of undue influence, testimony is competent as to the physical and mental weakness, age, and other infirmities of the testator, and statements of his inconsistent with the terms of the will are admissible since such evidence tends to show inability to resist improper influence.—*Ekern v. Erickson*, 37 S. D. 300, 308, 157 N. W. 1062.

(13) *Declarations of testator.*—External facts, constituting the exercise of undue influence, must be established by other evidence than the declarations of the testator. His declarations are incompetent to show either that the influence was exercised, or that it affected his actions, and are inadmissible, except as they may illustrate his mental state and give a picture of the condition of his mind, contemporaneous with the declarations themselves.—*Calkins' Estate v. Calkins*, 112 Cal. 296, 44 Pac. 577, 579. Declarations of the deceased made after the execu-

tion of the will, and showing his dissatisfaction with it, can not be admitted to prove the fact of undue influence. In the absence of proof of undue influence, such declarations are entitled to no weight.—*Gwin v. Gwin*, 5 Ida. 271, 48 Pac. 295, 301. See *Herwick v. Langford*, 108 Cal. 608, 704, 41 Pac. 701; *Estate of McDevitt*, 95 Cal. 17, 30 Pac. 101. Evidence of what the testator said, just before his death, to his executor, as to what was intended by his will, and who wrote it, where such declarations sought to be proved were made five years after the date of the will, is inadmissible, and constitutes no part of the *res gestae*.—*Estate of Gilmore*, 81 Cal. 240, 22 Pac. 655, 656. Oral declarations of a testator, as to what he intended, can not be admitted to vary the plainly expressed intention in the will. Testimony to the effect that a stepdaughter of a brother of a testatrix was spoken of by the testator as his "niece," is insufficient to bring her within the category of "my nieces."—*Estate of Holt*, 146 Cal. 77, 79 Pac. 585. In a will contest by an illegitimate son, a statement of the testator, made two days before his death and twenty-six days after the execution of his will, that he "was talked into making the will and cutting my boy off without a cent," is inadmissible by the contestant on the issue of undue influence, being no part of *res gestae* of the execution of the will.—*Estate of Jones*, 166 Cal. 108, 135 Pac. 288. The declarations of the testatrix, when not part of the *res gestae*, are not admissible to prove, nor may they be considered by the jury for the purpose of showing, the exercise of undue influence, although they are entitled to be shown and considered for the purpose of illustrating the state of mind of the testatrix when that state of mind was material.—*Estate of Ricks*, 160 Cal. 469, 117 Pac. 539. Declarations of a testatrix made subsequent to the execution of her will are not admissible as proof themselves of undue influence or fraud.—*Estate of Ricks*, 160 Cal. 450, 117 Pac. 532. On the contest of a will by a daughter of the testatrix, for alleged incompetency and undue influence, declarations of the testatrix that she intended to leave her property to the contestant were admissible only to show the relations between the two and the state of the testatrix's mind with reference to the daughter. Where unsoundness of mind is not shown, such declarations, not a part of the *res gestae*, are entitled to little or no weight, in the absence of proof of influence as to the very testamentary act.—*Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762. Declarations made prior to the execution of the will by the person jointly charged with the beneficiary in exercising undue influence, concerning her dealings with the deceased, are admissible.—*Estate of Strachan*, 166 Cal. 162, 135 Pac. 296. Evidence that on testatrix's refusal to loan contestant a cultivator, and his inquiry as to reason for her treating him thus, she replied in presence of L. charged with undue influence that L. made her do it, held admissible.—In *Re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598. Where a codicil to a will is contested on the grounds of undue influence and fraud practiced by the sole beneficiary of the testatrix, the evidence of such undue in-

fluence and fraud relied upon by contestant being an alleged false and fraudulent statement made by the principal beneficiary to the testatrix, declarations made by the testatrix, in the presence of the executor and sole beneficiary of her will, to the effect that he had made such a statement to her, taken in connection with the conduct of the beneficiary at the time the declarations were made, in not denying the same, are admissible in evidence as an admission on his part of the fact of making such a statement.—*Estate of Ricks*, 160 Cal. 469, 117 Pac. 539. Evidence of declarations of testatrix in the presence of a person charged with undue influence to the effect that such person had broken her arm and had hit her with a frying pan, and that such person did not deny truth of such statements, was held to be admissible as admissions where the theory of contestants was that prior to death of testatrix's husband, the person so charged was uniformly cruel to the testatrix but that since then her attitude had changed for the purpose of obtaining influence over the testatrix to the prejudice of contestants.—*In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.

(14) *Fraud*.—Where a will was contested on the ground of fraud it was held that, in the absence of proof connecting the persons charged with the fraud with the making of the will, as inducing or procuring agencies, evidence disputing the claim of indebtedness made in the will was not material.—*Hopper v. Sellers*, 91 Kan. 876, 139 Pac. 365. False representations by beneficiary charged with undue influence, made to testatrix as to amount of property received by contestant from father to influence testatrix to exclude contestant, held admissible.—*In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598. Where a will and codicil executed at different dates are contested on the ground of alleged undue influence and fraud, and the evidence presented bore on the validity of both instruments, and the court granted a nonsuit as to the contest of the will, in determining whether any case was made by the contestant showing undue influence as to the execution of the will, or fraud practiced on the testatrix in its execution, the evidence must be considered separately and treated with reference to the different dates when the two instruments were executed.—*Estate of Ricks*, 160 Cal. 450, 117 Pac. 532.

(15) *Sufficiency of evidence*.—To show that will of robust man of fixed ideas was procured by undue influence.—*In re Riordan's Estate*, 13 Cal. App. 313, 109 Pac. 629. If there is any substantial evidence tending to prove all facts necessary to make out contestant's case, they are entitled to have case go to jury.—*In re Daly's Estate*, 15 Cal. App. 329, 114 Pac. 787. Although undue influence may be proved either by direct or circumstantial evidence, yet the facts must go further than to raise a suspicion of undue influence, or to show a mere opportunity to exercise it.—*Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597.

(16) *Insufficiency of evidence*.—The mere fact that the relation of mother and son existed between a testatrix and the beneficiary of her

will, and that the son was also her business agent at about the time the will was made, is not sufficient of itself to warrant the jury in finding that undue influence was exerted by the son in the making of the will.—Estate of Ricks, 160 Cal. 450, 117 Pac. 532. Evidence held insufficient for jury.—In re Higgins's Estate, 156 Cal. 257, 104 Pac. 6. Evidence held to sustain finding of absence of undue influence or conspiracy of son and executor in execution of codicil.—In re Weber's Estate, 15 Cal. App. 224, 114 Pac. 597. Evidence held insufficient to show undue influence by testator's wife.—In re Carither's Estate, 156 Cal. 422, 105 Pac. 127. Evidence insufficient, in a married daughter's contest of the will of her mother, insufficient to show undue influence exerted upon the mind of the testatrix by a grandchild and her husband.—In re Dale's Estate, Tobias v. Mathews, 92 Or. 57, 179 Pac. 274.

REFERENCES.

What is undue influence and the tests in that connection.—See note 31 Am. St. Rep. 670. Admission of declarations of executor on issue of undue influence.—See note Ann. Cas. 1913A, 87. Declarations of legatee or devisee, admissibility of, on issue of undue influence.—See note 21 Ann. Cas. 50. Character of presumption as to undue influence in gift or bequest to mistress.—See note 11 L. R. A. (N. S.) 554. Presumption of undue influence arising from relation of man and mistress.—See note 9 Am. & Eng. Ann. Cas. 783. Unnatural or unreasonable character of will as evidence of undue influence.—See note 7 Am. & Eng. Ann. Cas. 894.

15. Instructions to jury.—Instructions to a jury, upon the issue of undue influence and fraud, are erroneous, where the court, in effect, tells the jury that they are at liberty, under the circumstances of the case, to find that the will under investigation had been executed by reason of undue influence,—although there was no direct evidence of the fact, and this in opposition to positive evidence to the contrary.—Calkins' Estate v. Calkins, 112 Cal. 296, 44 Pac. 577, 580. The fact that the testator commits suicide is to be considered by the jury only as a fact in evidence bearing upon the issue of the sanity or insanity of the deceased. The refusal of the court to give the following instruction, to wit: "The jury are instructed that the fact that the testatrix committed suicide, if the jury shall find that she did commit suicide, is not of itself sufficient evidence of unsoundness of mind; but this is proper to be considered upon the question of the mental condition of the testatrix, and if the jury find that Bertha M. Dolbeer did commit suicide, they may take that fact into consideration in determining whether or not she was of sound mind at the time of the making of the will in question"; and other instructions which may be considered to stand in like position, afford no substantial ground for a reversal of the case, where the jury was instructed that they were to consider all the evidence in the case in determining this question.—Estate of Dolbeer, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695, 706. Where the question as to whether the testator was of sound mind at the time of executing his

will was submitted to the jury and they were unable to agree on an answer thereto it is not error for the court to direct an affirmative answer to be made where there was no evidence upon which the jury could properly have found an answer in the negative.—*Hedderich v. Hedderich*, 18 N. D. 497, 123 N. W. 276. Instruction defining testamentary capacity held not erroneous considered in connection with instructions defining "sound mind."—*In re Higgins's Estate*, 156 Cal. 257, 104 Pac. 6. Instruction held to properly declare law as to unreasonableness or unjustness of provisions "if there is no defect of testamentary capacity," as against objection that jury were deprived of right to consider terms of will.—*In re Higgins's Estate*, 156 Cal. 257, 104 Pac. 6. Instructions permitting consideration of nature of will as circumstance in determining existence of fraud or undue influence held proper.—*In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598. The admission in evidence of the certificate of proof accompanying the admission to probate of an earlier will is not erroneous, where the jury is instructed that the declaration in such certificate is not binding in the contest on trial.—*Estate of Strachan*, 166 Cal. 162, 135 Pac. 296. In a will contest on the ground of fraud and undue influence an instruction was not erroneous to the effect that two former wills were admitted in evidence for the purpose of showing the state of mind and feeling of the testator toward the beneficiary therein named, and not specifically to show that she made the will while of unsound mind or through undue influence or fraud.—*Estate of Everts*, 163 Cal. 449, 125 Pac. 1058. In a will contest on the ground of fraud and undue influence, the court instructed the jury that undue influence and unsoundness of mind were entirely distinct grounds for denying probate of a will; that a person might be the victim of undue influence whether at the time sound or unsound in mind, and that if they found that the testator was of unsound mind at the time of the execution of the will, that it was entirely immaterial whether or not the daughter exercised any undue influence over the testator in the matter of the execution of the will, because unsoundness of mind itself would incapacitate a person from executing a will. It was held that this instruction was not objectionable as authorizing the jury, after finding that unsoundness of mind existed, that they need not consider the evidence relating to undue influence.—*Estate of Everts*, 163 Cal. 449, 125 Pac. 1058. In a contest of a will on the ground of fraud and undue influence, there was no error in refusing requested instruction to the effect that two former wills were admitted for the purpose of tending to raise the probability of undue influence, and that they were limited to that effect. Such instruction would bear upon the effect of evidence.—*Estate of Everts*, 163 Cal. 449, 125 Pac. 1058. In a will contest where it appeared that a chart kept by nurses of the pulse and symptoms of the testatrix during her last illness had been lost, but there was no evidence that it was wilfully destroyed or suppressed or it was kept or delivered to the deponent, such facts did not furnish a basis for an instruction that the evidence wilfully suppressed

is presumed to be adverse to the party suppressing it.—*Estate of Everts*, 163 Cal. 449, 125 Pac. 1058. In a contest of a will on the ground of undue influence and fraud, the court refused an instruction to the effect that the amount of undue influence which will be sufficient to invalidate a will must of course vary with the strength or weakness of mind and will of the testator; and the influence which would subdue or control a mind naturally weak, or which had become impaired by age, weakness, or other cause, might have no effect to overcome a mind naturally strong and unimpaired by any of the causes stated. It was held that this instruction correctly stated the law, but there was no error in refusing the same, as the jury had been told in other charges that in considering the issue of undue influence they should take into consideration the age and mental and physical condition of the testator as shown by the evidence; that an influence which he was too weak to resist and which destroyed his free agency and which prevented the free and voluntary action of his judgment amounted to undue influence; and that undue influence was the control of another's will over that of the testator, whose faculties have become so impaired as to submit to their control.—*Estate of Everts*, 163 Cal. 449, 125 Pac. 1058. A court may instruct a jury, provided there is appropriate evidence before them, that if a testator was of unsound mind as to either the nature and extent of his property, or his relation to his children and the nature of their claims to his bounty, he can not be regarded as of sound mind and memory, although he may have been of sound mind as to all other persons and matters.—*Estate of Willits*, 175 Cal. 173, 165 Pac. 537. Where, in the matter of the contest over the admission of a will to probate, a jury has been called in to determine the sole question of the testator's soundness of mind, if counsel introduce other matters in the course of argument, the opposing counsel are entitled to have the court instruct the jury not to consider them.—*Estate of Martin*, 170 Cal. 657, 151 Pac. 138. A jury, called in to determine the testamentary capacity of the maker of a will offered for probate, should not be instructed by the court in a manner singling out and bringing into prominence isolated facts, thereby intimating that these facts are to be given special consideration.—*Estate of Martin*, 170 Cal. 657, 151 Pac. 138.

REFERENCES.

Intention of testator, instructions construing will according to.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1317.

16. Findings and verdict.

(1) **Effect of findings.**—Where a case is tried before a district court, without a jury, and a general finding of fact is made upon oral testimony, such finding is a finding of every special thing necessary to sustain the general finding, and is conclusive, in the appellate court, upon the doubtful or disputed questions of fact. So a general finding in favor of the validity of the will, as against the contesting parties,

is an affirmation of the circumstances of every special fact necessary to uphold the judgment.—*Smith v. Holden*, 58 Kan. 535, 50 Pac. 447, 450. A finding of insanity is of a probative fact, to establish the invalidity of a will, the same as duress or undue influence.—*Gridley v. Boggs*, 62 Cal. 190, 203. In a suit by one opposing the admission of a will to probate on the ground that the testator was not of sound and disposing mind, but was, on the contrary, of unsound mind and insane, and mentally incompetent to make a will, findings by the court are sufficient that state hallucinations held by the testator to the prejudice of the plaintiff and that they were not founded on fact.—*Estate of Wineteer*, 176 Cal. 28, 167 Pac. 516.

(2) **Directing a verdict.**—In the trial of a contest over the probate of a will, before a jury, the court may, as in an ordinary civil action, when the facts of the case require it, direct a verdict, and a failure to do so, in such case, would be an evasion of duty.—*In re Shell's Estate*, 28 Colo. 167, 89 Am. St. Rep. 181, 53 L. R. A. 387, 63 Pac. 413, 415. The court has the same power in will contests to direct a verdict as in ordinary civil suits and whether the court in directing the jury to return the verdict commits error is to be determined by the rules applicable in ordinary civil cases.—*Miller v. Weston*, 25 Colo. App. 231, 138 Pac. 424, 428. In a will contest, as in ordinary civil actions, the court may direct a verdict when the facts require it.—*Estate of Carey*, 56 Colo. 77, 89, Ann. Cas. 1915B, 951, 51 L. R. A. (N. S.) 927, 136 Pac. 175. Upon the trial in the circuit court upon appeal from a judge sitting as a court of probate in the matter of the probate of a contested will, the contestant is entitled to have the issues tried by a jury, but the court may in proceedings of this sort where the facts of the case require it, direct a verdict.—*In re Will of Kalua*, 23 Haw. 149. If a will is offered for probate, but is contested on the ground of undue influence exercised by the contestee over the testator, and the charge of undue influence is not sustained by the evidence, it is error to deny a motion for a directed verdict.—*Cook v. Bolduc*, 24 Wyo. 281, 291, 157 Pac. 580, 158 Pac. 266.

(3) **Mistrial.**—Where the findings, upon questions growing out of a contest of the probate of a will, are either upon conclusions of law and not of fact, or upon immaterial or irrelevant matters, the effect is a mistrial, and no lawful judgment can be entered thereon.—*In re Langan's Estate*, 74 Cal. 353, 16 Pac. 188, 189.

(4) **New trial.**—Where special findings in a proceeding to contest the probate of an alleged will are so contradictory and inconsistent that no conclusion of law can be drawn from them, a judgment rendered thereon can not be sustained, and a new trial should be granted.—*Gwin v. Gwin*, 5 Ida. 271, 48 Pac. 295, 297; *Kearns v. McKean*, 65 Cal. 411, 4 Pac. 404. The matter of receiving oral testimony on a motion for new trial in the contest of a will, in addition to the affidavits required

by the statute of Colorado, is within the discretion of the trial court.—*In re Burnham's Will*, 24 Colo. App. 131, 134 Pac. 259.

17. Appeals.

(1) *In general.*—A proceeding to probate a will is in rem. The judgment is in rem, and from it, any person interested may appeal.—*Blackman v. Edsall*, 17 Colo. App. 429, 68 Pac. 790, 791. Under the provisions of the Idaho statute, an appeal may be taken to the district court from a judgment or order of the probate court in probate matters, —among other orders, that of admitting or refusing to admit a will to probate. But the provisions of that section do not apply to appeals from the district court to the supreme court.—*In re Paige's Estate*, 12 Ida. 410, 86 Pac. 273, 274. An application for a writ of certiorari, made to the supreme court, to review an order vacating and annulling an order admitting a will to probate, will be refused, where an appeal from the order would afford adequate relief.—*Dunsmuir v. Coffey*, 148 Cal. 137, 82 Pac. 682. Under the statute of Kansas, an appeal will lie to the district court from a decision of the probate court refusing to admit a will to probate, notwithstanding the amendment of 1907, by which such order may be contested in a civil action in the district court brought within three years after the refusal to probate; the remedy provided by such amendment being held merely cumulative.—*In re Durant's Will*, 89 Kan. 347, 131 Pac. 613.

(2) *Parties.* Who entitled to appeal.—Infants desiring to obtain the probate of a will may institute a proceeding therefor by a next friend, and through him may appeal from a decision of the probate court rejecting a will.—*Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738. The beneficiaries under a trust created by a holographic will are entitled to appeal from an order refusing the probate of such will, because they are "aggrieved" parties, and the court will not, on appeal, determine the validity of the trust clause as to the appellants.—*Estate of Fay*, 145 Cal. 82, 87, 104 Am. St. Rep. 17, 78 Pac. 340, 342. Where the trial court rightly holds, on a petition for distribution, that the probate of the will was conclusive on all parties, it follows that persons claiming to be heirs have no interest in the proceedings, where they were not beneficiaries under the will. Such persons are not "aggrieved" by orders or proceedings in the estate, subsequent to the probate of the will.—*Estate of Davis*, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183, 186, 90 Pac. 711. Upon appeal from an order admitting a will to probate the contestant must first establish his interest.—*Estate of Latour*, 140 Cal. 437, 73 Pac. 1070, 74 Pac. 444; *Estate of Edelman*, 148 Cal. 233, 113 Am. St. Rep. 231 82 Pac. 962, 963. An executor named in a will is entitled to appeal from a judgment that the will is invalid, and refusing to admit it to probate. He has a direct interest in having the will sustained, and the same probated, and is necessarily "aggrieved" by a denial of his right to act as executor.—*Halde v. Schultz*, 17 S. D. 465, 97 N. W. 369, 370. In an action by an administrator and certain remote

beneficiaries of a will devising real estate, against other beneficiaries thereunder, for a construction of the will, the administrator has no such interest in the controversy as to entitle him to a review of the judgment on appeal; an appeal from the judgment in such a case will therefore be dismissed.—*Virden v. Hubbard*, 37 Colo. 37, 86 Pac. 113; *Barth v. Richter*, 12 Colo. App. 365, 55 Pac. 610. If an executor renounces his right to appointment, and a devisee petitions to have the will proved, which is unsuccessfully contested by the heirs of the testator, but upon appeal by them to the district court, and after a trial *de novo*, the probate of the will is refused, the contestants and proponent are the parties to the proceedings in the lower court, and are the only necessary parties to the proceedings in error in the supreme court to review the judgment of the district court.—*In re James' Will*, *Maxey v. Logan* (Okla.), 166 Pac. 131.

(3) *Notice of appeal*.—A notice of appeal, dated and served after the perfection of the decree, in a proceeding for the probate of a will, clearly indicating that the appellant desired to appeal from the whole decree in said proceeding, and describing the decree as one dated the day the findings and conclusions were filed, should be construed to be a notice of appeal from the final decree, and not from the findings and conclusions alone.—*In re Lemery's Estate*, 15 N. D. 312, 107 N. W. 365. Upon an appeal from an order admitting a will to probate, the legatees and devisees under the will are "adverse parties," upon whom the notice of appeal must be served.—*Estate of Scott*, 124 Cal. 671, 674, 57 Pac. 654.

(4) *Settlement of statement*.—In settling a statement of the proceedings, in a contest of the probate of an alleged will, it is not a proper exercise of the discretion vested in the trial judge, to require a transcript of the full reporter's notes as a condition for settling such statement, and a peremptory writ of mandate will issue requiring the judge to settle the same, either as presented, or as amended, so as to make a fair statement.—*Vatcher v. Wilbur*, 144 Cal. 536, 78 Pac. 14, 16. When the contest of a will of a deceased person offered for probate for alleged forgery has been sustained, and proponent has moved for a new trial and improper matter has been incorporated in the settled statement, an application of contestants made under section 473 of the Code of Civil Procedure of California within six months after the settlement of the statement to set it aside and to amend the statement on the ground that it does not truly represent the case, was properly granted in order to make it speak the truth. It was the duty of the trial court to have seen that the settled statement, which the appellate court was called upon to review, comported with verity.—*Estate of Thomas*, 155 Cal. 488, 101 Pac. 798.

(5) *Jurisdiction on appeal*.—The probate court is vested with full power to inquire into the sufficiency of the authentication, and to ascertain, whether, under the proof offered, the will should be admitted

to record. Being vested with jurisdiction, its findings and determination are final, unless corrected upon appeal or proceedings in error, and are not subject to collateral attack.—*Calloway v. Cooley*, 50 Kan. 743, 32 Pac. 372, 376. An order revoking an order refusing to admit a will to probate, is not within the appellate jurisdiction of the supreme court, not being named in section 963 of the California Code of Civil Procedure, enumerating reviewable matters.—*Estate of Bouysou*, 1 Cal. App. 657, 32 Pac. 1066. See *Estate of Cahill*, 142 Cal. 628, 76 Pac. 383. An order dismissing a contest over the probate of a will is reviewable upon appeal from the final order or judgment admitting the will to probate.—*Estate of Edelman*, 148 Cal. 233, 113 Am. St. Rep. 231, 32 Pac. 962, 963. On a contest of the probate of a will an objection that a medical witness, who had testified to the unsoundness of mind of the testatrix, was incompetent, under subdivision 4 of section 1881 of the Code of Civil Procedure of California, for the reason that his information was acquired while treating her as his patient, can not be availed of on appeal, unless objection to the testimony of the witness was specifically taken on that ground in the trial court, either by objections to the questions asked the witness, or by motion to strike out his evidence after the facts were elicited showing the incompetency.—*Estate of Huston*, 163 Cal. 166, 124 Pac. 852.

(6) *Record*.—Orders continuing the hearing for probating, under the California code, do not form a necessary part of the judgment roll, or "technical record"; and even if they did, their absence would not invalidate the order admitting the will to probate.—*Estate of Davis*, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183, 185, 90 Pac. 711. If the record is silent on the question of service, the court will presume that service was made, when the judgment comes into question collaterally.—*Estate of Davis*, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183, 185, 90 Pac. 711. Where the transcript also sets forth the order admitting the will to probate, which recites that it was "done in open court this 4th day of May, 1908," and the certificate of the judge attached to the will bears the same date as to its probate, these papers afford ample evidence that the will was admitted to probate on that day, and that the proper record thereof is in the minutes of the court bearing that date.—*Estate of Parsons*, 159 Cal. 425, 114 Pac. 570. The recital in the order appealed from as to the date of the order admitting the will to probate is conclusive. It has the effect of a finding that the proofs made at the hearing showed that the will was admitted to probate on May 4, 1908.—*Estate of Parsons*, 159 Cal. 425, 114 Pac. 570.

(7) *Time of appeal*.—The California code expressly requires probate orders to be entered in the minute-book of the court. It is the order there entered which is the order of the court, and it is the date of the entry of this order which, under the decisions, sets the time running for an appeal.—*Tracy v. Coffey*, 153 Cal. 356, 95 Pac. 150, 151. An appeal from an order refusing the probate of a holographic will is properly taken within sixty days from the entry of the order.—*Estate*

of *Fay*, 145 Cal. 82, 87, 104 Am. St. Rep. 17, 78 Pac. 340. Where an appeal from an order refusing to admit a will to probate is taken within sixty days after the entry of the order, it is within time, under the California code, and the section of the code providing for appeals within sixty days after "the rendition of the judgment" does not apply to appeals from such orders.—*Estate of Fay*, 145 Cal. 82, 83, 104 Am. St. Rep. 17, 78 Pac. 340, 342.

(8) **Presumption on appeal.**—Where the transcript does not show the date of the entry of the order admitting the will to probate in the minutes of the court, it must be presumed upon appeal in the absence of any evidence to the contrary, that the clerk performed his official duty and entered the order in the minutes of the court immediately after it was made on the same day.—*Estate of Parsons*, 159 Cal. 425, 114 Pac. 570. It is not error for the lower court to grant a change of judges. Whether respondent was or was not entitled to such change is immaterial, since the case is tried *de novo* in the supreme court. It can not be assumed that the judge from whom the case was transferred would have reached a different conclusion from that reached by the judge to whom it was assigned.—*Ingersoll v. Gourley*, 78 Wash. 406, Ann. Cas. 1915D, 570, 139 Pac. 208.

(9) **Consideration on appeal.**—Appellate courts confine the questions considered on appeal to such matters alone as were litigated before, and passed upon by, the trial court.—*Estate of Sullivan*, 40 Wash. 202, 111 Am. St. Rep. 895, 82 Pac. 297, 301. Alleged errors of law committed during the trial of a contest over the probate of a will are not ground for reversal, where the appellant was not prejudiced thereby.—*Estate of Spencer*, 96 Cal. 448, 450, 31 Pac. 453. An order dismissing the contest of a will, because of contestant's lack of interest, may be reviewed on appeal from an order admitting the will to probate.—*Estate of Edelman*, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 962, 963. Objections to evidence admitted upon the hearing of the petition for probate, can not be raised in the supreme court, unless first raised in the trial court at the hearing.—*Estate of Doyle*, 73 Cal. 564, 15 Pac. 125, 127. The granting of a new trial of a contest over the probate of a will, upon motion of contestants, will not be disturbed, unless it can be said that the court went beyond its discretion in granting the same.—*Estate of Wickersham*, 138 Cal. 355, 70 Pac. 1076, 1077. For an examination and review of testimony on a contest over the probate of a will, upon grounds of insanity, undue influence, and invalid execution of the will, on appeal, and reversing an order denying a new trial for contestant, see *Gwin v. Gwin*, 5 Ida. 271, 48 Pac. 295. In a contest over the probate of a will, where the issues are tried by a jury, the question, whether the court committed error in directing the jury to return a verdict in favor of the contestant, is to be determined by the rules applicable in ordinary civil actions.—*Snodgrass v. Smith*, 42 Colo. 60, 15 Ann. Cas. 548, 94 Pac. 312, 313.

(10) **Question that can not be first raised on appeal.**—An objection for want of signature or verification to a petition to set aside the probate of a will can not be raised for the first time on appeal.—*Scott v. McGirtt*, 41 Okla. 520, 139 Pac. 519.

(11) **Review of verdict or findings.**—The rule that a verdict or finding will not be disturbed, where there is a real or substantial conflict of evidence on the issue of fact involved, applies to litigation over the validity of wills as well as any other kinds of litigation.—*Estate of Doolittle*, 153 Cal. 29, 94 Pac. 240, 241; *In re Abel's Estate*, 30 Nev. 93, 93 Pac. 227, 230. See *Richardson v. Moore*, 30 Wash. 406, 71 Pac. 18, 20. Where the legatee of a charitable bequest is uncertain, the finding of the probate court, relating to such bequest, will not be disturbed on appeal.—*Estate of Casement*, 78 Cal. 136, 26 Pac. 362, 364. And the same rule applies to findings as to the mental condition of a deceased at the time of the execution of the will upon a hearing for its admission to probate.—*King v. Ponton*, 82 Cal. 420, 22 Pac. 1087, 1088. Also as to the verdict of the jury upon the issue of mental unsoundness of the testator.—*Estate of McKenna*, 143 Cal. 580, 77 Pac. 461, 462. And as to testamentary capacity, habits, and mental condition of the deceased.—*In re Rathjen's Estate*, 45 Wash. 55, 87 Pac. 1070. The findings of a jury upon the issue submitted to them, in a contest over the probate of a will, stand upon the same footing as the findings of fact made by the court in a civil action; that is, when the appellate court is brought to the consideration of their sufficiency to support the judgment rendered.—*Estate of Benton*, 131 Cal. 472, 63 Pac. 775, 776. There are many authorities which hold that, in a contest over the probate of a will, the verdict will not be set aside when the question as to the correctness of the verdict, in view of the evidence, is raised in the appellate court, unless there is clearly a legal insufficiency in the evidence to sustain it.—*In re Abel's Estate*, 30 Nev. 93, 93 Pac. 227, 230. And particularly has this been held to be the rule when the trial court has declined to interfere.—*In re Abel's Estate*, 30 Nev. 93, 93 Pac. 227, 230. Where, upon a contest over the probate of a will, one of the subscribing witnesses being dead and the other unable to recollect certain matters connected with the making of the will, no evidence was presented tending in any way to invalidate the will, the court found on proof of the signatures of the testatrix and the attesting witnesses, that the testimony was, under the circumstances, sufficient to establish the due execution of the instrument, such finding will not be disturbed on appeal.—*Estate of Tyler*, 121 Cal. 405, 53 Pac. 928, 929. Findings, absolutely without support, except such as they receive from the conclusions reached and expressed by the jury, as to the unsoundness of mind of the testator, are not binding upon the court upon appeal.—*Estate of Mullin*, 110 Cal. 252, 42 Pac. 645, 646. In the contest of a will on the ground of the alleged incompetency of the testator, the refusal of the court, after the case had been submitted and decided, to allow the proponents to file an amended answer to the

contest to cure a supposed defect in the original answer in its denials of the allegations of incapacity is immaterial where the case was tried on the theory that the competency of the testator was in issue, and the court found upon that question as one of fact.—*Estate of Loveland*, 162 Cal. 595, 123 Pac. 801. In the contest of a will on the ground of the alleged mental incompetency of the testator, the findings of the court to the effect that the testator was not mentally competent to make a will are held to be sustained by the evidence.—*Estate of Loveland*, 162 Cal. 595, 123 Pac. 801. Upon a review of the evidence it is held insufficient to sustain the findings of the jury that the testatrix, at the time of the execution of her will, did not understand its provisions, and that the will was executed as the result of undue influence exercised by the person nominated as executor and by one of the witnesses.—*Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762. Evidence held sufficient to sustain finding of undue influence by daughter on aged mother to prejudice of sons.—*In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.

(12) *Review of evidence.*—It is held, upon a review of the evidence, that there is nothing therein that is capable of doing more at the most than warranting a mere suspicion or surmise that undue influence may have been exerted in the matter of the execution of the will, and that it was insufficient to justify setting the will aside.—*Estate of Morcel*, 162 Cal. 188, 121 Pac. 733. It is held that the evidence is amply sufficient to sustain the finding of undue influence, notwithstanding the testimony of the only persons present at the time of its execution that no such influence was exerted.—*Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307. The verdict of the jury finding that the will was not executed as the result of undue influence or fraud held to be sustained by a great preponderance of the evidence.—*Estate of Everts*, 163 Cal. 449, 125 Pac. 1058. That there is no finding on an issue of fraud does not preclude consideration of evidence of fraud as bearing on an issue of undue influence.—*In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598. In this case of a will contest the evidence is sufficient to justify a finding by the jury that the testatrix was of an unsound mind at the time of the execution of the will.—*Estate of Strachan*, 166 Cal. 162, 135 Pac. 296. In this case of a will contest the evidence is found sufficient to support a finding of undue influence exerted by the sole beneficiary under the will and her mother.—*Estate of Strachan*, 166 Cal. 162, 135 Pac. 296. In reviewing, on appeal, an order granting a nonsuit on a contest of a will, in determining whether the evidence presented was sufficient to take the case from the jury, the entire evidence presented is to be viewed from a point most favorable to the contestant. Disregard is had of any contradictory evidence. All facts supporting the case of the contestant must be taken as true and all presumptions from the evidence and all reasonable inferences susceptible of being drawn therefrom must be considered as facts proven in his favor.—*Estate of Ricks*, 160 Cal. 450, 117 Pac. 532. In reviewing a directed verdict for the proponent, in a case of contest of the probate of a will, the supreme

court is concerned simply with the determination of the question as to whether the direct evidence introduced by the contestant, with the reasonable inference permissible to a jury to draw therefrom, would have sustained the verdict of the jury in favor of the contestant.—Estate of Caspar, 172 Cal. 147, 155 Pac. 631. The findings of the trial court, on the question of testamentary capacity, should be approved on appeal if sustained by a preponderance of the evidence.—Wilson v. Craig, 86 Wash. 465, Ann. Cas. 1917B, 871, 150 Pac. 1179. Where the probate of a will is protested on the grounds of mental incapacity and undue influence, the verdict of the jury and judgment of the court, sustaining the contest, will not be disturbed on appeal upon the ground of insufficiency of the testimony to support the verdict, though the testimony was conflicting, where there was testimony amply sufficient to justify the jury in finding that the testator was incapacitated mentally to make the will, and sufficient also to support the allegation of undue influence.—James v. James (Colo.), 170 Pac. 285. Where the evidence was conflicting upon the issue as to the mental capacity of the testator when he executed the codicil, this court must leave the matter where the trial court left it by its finding.—Estate of Weber, 15 Cal. App. 224, 114 Pac. 597. Where the testimony was conflicting as to the accuracy of photographs of the will the exclusion of depositions concerning the genuineness of the signature to the will based on such photographs will not be disturbed.—In re Haye's Estate, 55 Colo. 340, Ann. Cas. 1914C, 531, 135 Pac. 450. Where the contest of the probate of a will is sustained on the ground of undue influence, a finding upon that issue is supported by the clear and positive testimony of interested and hostile witnesses of such a nature as to warrant the verdict, if the jury believed it to be true, even if the conflicting evidence for the proponent was preponderating. All questions of credibility of witnesses and of the weight of the testimony were exclusively for the jury and the trial court. The rule is the same in will contests as in other proceedings, and a verdict or finding in such a case will not be disturbed where there is a real and substantial conflict upon the issues of fact involved.—Estate of Snowball, 157 Cal. 301, 107 Pac. 598. Where a will was attacked on the grounds of the testator's mental incapacity and of undue influence but no finding was made upon the issue of the mental capacity of the testator at the time he executed the will, and such neglect or refusal was not assigned as error, the testimony of persons familiar with the testator that he was mentally capable of making a will was held to be immaterial.—Ekern v. Erickson, 37 S. D. 300, 307, 157 N. W. 1062. If the facts proved to remove ambiguity from the language of a will are admitted or established without conflict, the justness of the application which the court made of those facts in its construction will equally, as a legal proposition, be the subject of review.—Estate of Donnellan, 164 Cal. 14, 127 Pac. 166, 168. Where the probate of a will was contested upon questions of testamentary capacity and undue influence, there being testimony by the proponents that

the deceased had gloated over the fact that his will was so fixed that the contesting daughter would not get any of his property, it was error to exclude testimony by her, that she had never had any trouble with her father, on the ground that it related to transactions between the contestant and the testator.—*Johnson v. Shaver* (S. D.), 172 N. W. 676, 680.

(13) **Harmless error.**—It is harmless to exclude certain evidence as to cause of death conceded to have been poison.—*In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130. The admission of testimony of the contestant of a will that the testatrix was in an infirm mental state at the time immediately following a judicial declaration of her incompetency is not prejudicially erroneous.—*Estate of Strachan*, 166 Cal. 162, 135 Pac. 296. Persons who contested the validity of a will, offered for probate by respondent, and who, although present, did not oppose or except to the court's order of dismissal of her petition for probate, on respondent's motion, are not prejudiced by such dismissal.—*In re Bergland's Estate*, 177 Cal. 227, 170 Pac. 400, 401.

(14) **Direct and collateral attack.**—Proceedings in the course of administration of an estate, where the order or judgment made is appealable, such as orders admitting wills to probate, etc., which can be attacked directly by appeal, or by some motion authorized by law for the purpose, or, perhaps, by a bill in equity, are steps in the administration intended to be final in their nature, and not subject to review in a subsequent stage of the administration of the estate. An attack, in any other way, made in a different proceeding in the same estate, is collateral.—*Estate of Davis*, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183, 185, 90 Pac. 711. See *Estate of Devincenzi*, 119 Cal. 498, 51 Pac. 845. In a collateral attack upon a judgment of a court of general jurisdiction, the judgment can be impeached only for a want of jurisdiction appearing upon the face of the judgment roll; or, as sometimes stated, only a judgment which is void on its face may be set aside on collateral attack.—*Estate of Davis*, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183, 185, 90 Pac. 711. See *People v. Thomas*, 101 Cal. 571, 36 Pac. 9; *Estate of Elchoff*, 101 Cal. 600, 36 Pac. 11. An order admitting a will to probate, even though erroneous, is still valid unless reversed upon direct proceedings on appeal.—*Dunsmuir v. Coffey*, 148 Cal. 137, 82 Pac. 682, citing *Goldtree v. McAllister*, 86 Cal. 93, 24 Pac. 801; *Erwin v. Scriber*, 18 Cal. 500. A declaration of the probate court, as to the residence of deceased at the time of his death, is final in all collateral proceedings.—*Estate of Dole*, 147 Cal. 188, 81 Pac. 534, 537. Heirs at law, who expressly consented to a decree probating a will, can not afterward, without any showing of fraud, be permitted to attack the decree, where the judgment was not void, and the error committed by the court, if any, in admitting the will to probate, was not an error in the assumption of jurisdiction, but in the exercise of jurisdiction, which it had assumed and had. If there was error in

admitting the will to probate, it was reviewable only on error or appeal.—*Camplin v. Jackson*, 34 Colo. 447, 83 Pac. 1017, 1018.

(15) **Effect of appeal as to executor's powers.**—An appeal by an executor, from an order annulling decedent's will, does not have the effect of authorizing him to continue acting for all purposes as executor, notwithstanding the judgment entered by the court. The appeal has the effect of continuing him as executor only for the purposes of such appeal, but does not revive his general powers as executor.—*State v. Superior Court*, 28 Wash. 677, 69 Pac. 375, 377.

(16) **Reversal.**—In a will contest based on the grounds of both undue influence and insanity, a judgment in favor of the contestant will not be reversed on appeal for error in admitting declarations of the testator on the issue of undue influence, where the evidence is sufficient to support the verdict as to mental unsoundness.—*Estate of Jones*, 166 Cal. 108, 135 Pac. 288. In the trial of a contest to the probate of a will, the action of the court in withdrawing, of its own motion, an issue of undue influence from the consideration of the jury, even if irregular, will not justify a reversal if the evidence on that issue was so conclusive in favor of the proponent that the court would have been compelled to set aside a verdict in favor of the contestant.—*Estate of Higgins*, 156 Cal. 257, 104 Pac. 6. In this case on an appeal from a judgment setting aside a will on the ground of undue influence the findings and assignments of error were reviewed and held not to require a reversal.—*Fairbank v. Fairbank*, 92 Kan. 45, 139 Pac. 1011.

18. **No review in equity.**—A decree probating a will is not subject to review in equity for fraud or mistake.—*Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317, 319. The general rule that equity will set aside judgments for extrinsic fraud has an exception in the case of decrees admitting wills to probate.—*Stead v. Curtis*, 205 Fed. 439, 123 C. C. A. 507. The fact that jurors in a probate proceeding were disqualified, or committed perjury to escape successful challenge, does not give a court of equity jurisdiction to set aside the judgment admitting the will to probate.—*Stead v. Curtis*, 205 Fed. 439, 123 C. C. A. 507.

CHAPTER III.

PROBATE OF FOREIGN WILLS.

- § 1003. Wills proved in other states to be recorded, when and where.
- § 1004. Proceedings on production of foreign will.
- § 1005. Form. Petition for probate of foreign will.
- § 1006. Form. Notice of time and place set for hearing petition for probate of foreign will, and for the issuance of letters testamentary thereon.
- § 1007. Form. Notice of time and place fixed for hearing petition for probate of foreign will and for the issuance thereon of letters of administration with the will annexed.
- § 1008. Hearing proofs of probate of foreign will.
- § 1009. Form. Certificate of proof of foreign will and facts found.
- § 1010. Form. Order admitting foreign will to probate and for letters (with or without bond).

PROBATE OF FOREIGN WILLS.

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| 1. In general. | 4. Instrument when not entitled to probate as such. |
| 2. Jurisdiction of courts. | 5. Issues to be determined. |
| 3. Effect of foreign judgment. | |

§ 1003. Wills proved in other states to be recorded, when and where.

All wills duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the superior court of any county in which the testator shall have left any estate.—*Kerr's Cyc. Code Civ. Proc.*, §1322.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 755.

Colorado—Mills's Statutes of 1912, section 7892; as amended by Laws of 1915, chapter 173, page 488 (admission of probated foreign will without further notice or proof).

Idaho*—Compiled Statutes of 1919, section 7459.

Kansas—General Statutes of 1915, sections 11779, 11780.

Montana*—Revised Codes of 1907, section 7404.

Nevada—Revised Laws of 1912, section 5878.

New Mexico—Statutes of 1915, section 5885.

North Dakota—Compiled Laws of 1913, section 8672.

Oklahoma—Revised Laws of 1910, section 6216.

South Dakota—Compiled Laws of 1913, section 5677.

Utah*—Compiled Laws of 1907, section 3806.

Washington—Laws of 1917, chapter 156, pages 645, 649, section 22.

Wyoming*—Compiled Statutes of 1910, section 5420.

§ 1004. Probate of foreign will.

When a copy of the will, and the order or decree admitting same to probate, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed, and the clerk of the court must appoint a time for the hearing; notice whereof must be given as hereinbefore provided for an original petition for the probate of a will.—*Kerr's Cyc. Code Civ. Proc.*, § 1323.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 577.

Arizona*—Revised Statutes of 1913, paragraph 756.

Colorado—Mills's Statutes of 1912, section 7892; as amended by Laws of 1915, chapter 173, page 488 (admission of probated foreign will without further notice or proof).

Idaho—Compiled Statutes of 1919, section 7460.

Kansas—General Statutes of 1915, section 11781.

Montana—Revised Codes of 1907, section 7405.

Nevada—Revised Laws of 1912, section 5879.

New Mexico—Statutes of 1915, section 5885.

North Dakota—Compiled Laws of 1913, section 8672.

Oklahoma*—Revised Laws of 1910, section 6217.

Oregon—Lord's Oregon Laws, section 7333.

South Dakota—Compiled Laws of 1913, section 5678.

Utah—Compiled Laws of 1907, section 3807.

Washington—Laws of 1917, chapter 156, pages 645, 649, section 22.

Wyoming—Compiled Statutes of 1910, section 5421.

§ 1005. Form. Petition for probate of foreign will.

[Title of court.]

[Title of estate.]

{ Department No. —.
[Title of form.]

To the Honorable the —¹ Court of the County² of —, State of —.

The petition of —, of the county³ of —, state of —, respectfully shows:

That — died on or about the — day of —, 19—, at —,⁴ in the county ⁵ of —, state of —;

That said deceased at the time of his death was a resident of the county ⁶ of —, state of —, and left property in the county ⁷ of —, state of —;

That the character of the said property and probable revenue therefrom are as follows, to wit: —;⁸

That the estate and effects in respect of which the probate of the will is herein applied for does not exceed in value the sum of — dollars (\$—);

That said deceased left a will bearing date the — day of —, 19—, which has been duly proved, allowed, and admitted to probate in the —⁹ court of the county ¹⁰ of —, state of —; that a duly authenticated copy of said will and the probate thereof in said court is presented and filed herewith; that said court at the time of admitting said will to probate was a court of competent jurisdiction, and had jurisdiction of said matters and of all parties interested in said estate;

That your petitioner is the person named in said will as executor thereof and consents to act as such executor;¹¹

That —, aged about — years, residing at —, and —, aged about — years, residing at —, are named therein as devisees and legatees;

That the next of kin of said testator, whom your petitioner is advised and believes, and therefore alleges to be, the heirs at law of said testator, and the names, ages, and residences of said heirs are as follows, to wit,—

Names.	Ages.	Residences.
—	—	—
—	—	—

Wherefore your petitioner prays that the said will may be admitted to probate, and that letters testamentary thereon be issued to your petitioner; that for that purpose a time be appointed for proving said will; that all persons interested be notified to appear at the time

appointed for proving the same; and that all other necessary and proper orders may be made in the premises.

Dated —, 19—. —, Petitioner.

—, Attorney for Petitioner.

Explanatory notes.—1 Title of court. 2 Or, City and County. 3 Or, city and county. 4 State place. 5-7 Or, city and county. 8 State character and revenue. 9 Title of court. 10 Or, city and county. 11 Or, that — is named in said will as executor or executrix thereof, and refuses to act as such, and that your petitioner is a person interested in the will of said deceased.

§ 1006. Form. Notice of time and place set for hearing petition for probate of foreign will, and for the issuance of letters testamentary thereon.

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.
[Title of form.]

Notice is hereby given, That a petition for the probate of the will of —, deceased, and for the issuance of letters testamentary thereon to —, has been filed in this court, and that —,² the — day of —, 19—, at — o'clock in the forenoon³ of said day at the court-room of said court,⁴ in said county⁵ and state, have been set as the time and place for the hearing of said petition, when and where any person interested may appear and contest the same, and show cause, if any they have, why said petition should not be granted. Said will is a foreign will, heretofore admitted to probate in the state of —.

Dated —, 19—. —, Clerk.

[Seal] By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2 Day of week. 3 Or, afternoon. 4 Give location of court-room. 5 Or, city and county. Proceedings on production of foreign will. See § 1004, ante.

§ 1007. Form. Notice of time and place fixed for hearing petition for probate of foreign will and for the issuance thereon of letters of administration with the will annexed.

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

A duly authenticated copy of the last will of —, deceased, and of the order and decree admitting said will to probate, together with a petition for the admission of the said will to probate in this county and state, and for the issuance to —, of letters of administration with the will annexed, having been filed in this court, and a hearing thereon asked for,—

Now I, — clerk of said — court, hereby fix and appoint —,² the — day of —, 19—, at — o'clock in the forenoon³ of said day, and the court-room of said court, at the court-house in the said county of —, state of —, as the time and place for proving said will and for hearing said petition. ⁴ Said will is a foreign will heretofore admitted to probate in the state of —.

Dated —, 19—.

[Seal]

—, Clerk,

By —, Deputy Clerk.

Explanatory notes.—¹ Give file number. ² Day of week. ³ Or, afternoon. ⁴ Notice, how given, see § 1004, referring to § 969.

§ 1008. Hearing proofs of probate of foreign will.

If, on the hearing, it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate, and have the same force and effect as a will first admitted to probate in this state, and letters testamentary or of administration issued thereon.—*Kerr's Cyc. Code Civ. Proc.*, § 1324.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 577.

Arizona*—Revised Statutes of 1913, paragraph 757.

Colorado—Mills's Statutes of 1912, section 7892; as amended by Laws of 1915, chapter 173, page 488 (admission of probated foreign will without further notice or proof).

Idaho*—Compiled Statutes of 1919, section 7461.

Kansas—General Statutes of 1915, section 11782.

Montana*—Revised Codes of 1907, section 7406.

Nevada—Revised Laws of 1912, section 5878.

New Mexico—Statutes of 1915, sections 5885-5887.

North Dakota—Compiled Laws of 1913, section 8672.

Oklahoma—Revised Laws of 1910, section 6218.

Oregon—Lord's Oregon Laws, section 7333.

South Dakota—Compiled Laws of 1913, section 5679.

Utah*—Compiled Laws of 1907, section 3808.

Washington—Laws of 1917, chapter 156, pages 646, 649, sections 13, 23.

Wyoming*—Compiled Statutes of 1910, section 5422.

§ 1009. Form. Certificate of proof of foreign will and facts found.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

I, —, Judge of the said —² Court, do hereby certify:

That there was produced by —,³ a copy of the will of —, and the probate thereof, in the —⁴ court, of the county⁵ of —, state of —, duly authenticated, and said will, a copy of which is annexed hereto, was on the — day of —, 19—, admitted to probate in this court as the last will of —, deceased, and from the proceedings taken, and from an examination had therein on said day, the court finds as follows,—

That said — died on or about the — day of —, 19—, in the county⁶ of —, state of —; that at the time of his death he was a resident of the county⁷ of —, state of —; that said will, a copy of which is annexed hereto, was duly proved, allowed, and admitted to probate as the last will of —, deceased, in the —⁸

court, of the county ⁹ of —, state of —, by an order of said court duly entered therein on the — day of —, 19—; that said court, at the time of making said order, was a court of competent jurisdiction and had jurisdiction in said matter and of all persons interested in the estate of said decedent; that said will was executed according to the laws of the state of —, in which state it was made.¹⁰

In witness whereof, I have signed this certificate and caused the same to be attested by the clerk of this court under the seal thereof this — day of —, 19—.

—, Judge.

[Seal]

Attest: —, Clerk of the — Court.

By —, Deputy.

Explanatory notes.—1 Give file number. 2 Title of court. 3 The executor named in the will, or a person interested in the will. 4 Title of court. 5-7 Or, city and county. 8 Title of court. 9 Or, city and county. 10 Or, according to the laws of the state of —, in which the testator was domiciled at the time of his death; or, in conformity with the laws of this state. A copy of the will should be attached to the certificate, and recorded. See *Goldtree v. McAllister*, 86 Cal. 93, 101, 23 Pac. 207, 24 Pac. 801.

§ 1010. Form. Order admitting foreign will to probate and for letters (with or without bond).

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

Now comes the petitioner, —, by —, his attorney, and presents a copy of the last will of said deceased, and the probate thereof, in the county ² of —, state of —, duly authenticated, and proves to the satisfaction of the court that the time for hearing the petition for the probate of the will, filed on the — day of —, 19—, and for letters testamentary thereon ³ was by the court ⁴ duly set for hearing on the — day of —, 19—, and that notice of said hearing has been duly given as required by law and the order of said court; and the matter now coming regularly on for hearing,⁵ and no person appearing

to contest the said petition, the court proceeds to hear the evidence, and thereupon finds the facts alleged therein to be true, and that said petition ought to be granted; and it appearing on the face of the authenticated record of the probate of said will so presented and on file herein, that said will has been duly proved, allowed, and admitted to probate in the —⁶ court of the county⁷ of —, state of —, on the — day of —, 19—, and that said will was executed according to the laws of the state of —, in which the same was made,⁸—

It is therefore adjudged and determined by the court, That — died testate on the — day of —, 19—, a resident of the county⁹ of —, state of —, leaving an estate in the county of —, state of —;

And it is ordered, That the instrument in writing heretofore admitted to probate in the —¹⁰ court of the county¹¹ of —, state of —, as the last will of said deceased, and so alleged to be in said petition, a certified copy of which is filed herein, be admitted to probate as the last will of said deceased; that — be appointed executor¹² of said estate; and that letters testamentary¹³ issue to said — upon his taking the oath required by law,¹⁴ without any bond being required.

—, County Clerk.

Entered¹⁵ —, 19—.

By —, Deputy.

Explanatory notes.—1 Give file number. 2 Or, city and county. 3 Or, and for letters of administration with the will annexed, as the case may be. 4 Or, clerk, if authorized by statute. 5 Or, if the matter has been postponed, say: "and the hearing having been regularly continued to this time." 6 Title of court. 7 Or, city and county. 8 Or, according to the laws of the state of —, in which state the testator was domiciled at the time of his death; or, in conformity with the laws of this state. 9 Or, city and county. 10 Title of court. 11 Or, city and county. 12 Or, administrator with the will annexed, as the case may be. 13 Or, of administration with the will annexed. 14 If bonds are not waived, say: "and giving bond in the sum of — dollars (\$—)." 15 Orders or decrees need not be signed. See § 77, ante.

PROBATE OF FOREIGN WILLS.

- | | |
|--------------------------------|---|
| 1. In general. | 4. Instrument when not entitled to probate as such. |
| 2. Jurisdiction of courts. | 5. Issues to be determined. |
| 3. Effect of foreign judgment. | |

1. In general.—A will executed in a foreign country, by a person domiciled there, is not required to be first proved in the foreign country before it is provable in the state in which the decedent left his property.—*Clayson v. Clayson*, 26 Wash. 253, 66 Pac. 410. The domicile of a testator is the place of his permanent home, and involves a question of fact and intent. In this respect, it differs from residence, which may or may not be his place of permanent residence or domicile. The person may have many places of residence, but in the law only one place of domicile.—*Pickering v. Winch*, 48 Or. 500, 9 L. R. A. (N. S.) 1159, 87 Pac. 763. The article of the Code of Civil Procedure of the state of California (sections 1322-24), on the probate of foreign wills, must prevail over all conflicting provisions as to all matters and questions arising out of the subject-matter of such article. Under that article the executor named in a foreign will is entitled to letters testamentary and in the absence of an application by him letters must be granted "to any other person interested in the will," who applies for them, provided the applicant has the qualifications prescribed by the law for an administrator.—*Estate of Meier*, 165 Cal. 456, Ann. Cas. 1914D, 121, 48 L. R. A. (N. S.) 858, 132 Pac. 764. The code of California, in providing that administration may be had on a foreign will in any county in that state in which the testator left property, has reference only to property existing in such county at the time of the application for letters.—*Estate of Doughaday*, 168 Cal. 63, 141 Pac. 929. Where a testator died leaving property in two states in one of which he had his domicile and his will was probated there it is also necessary that the will be probated in the other state in order to administer upon the property situate therein.—*State v. Superior Court*, 52 Wash. 149, 100 Pac. 199. A will executed in strict conformity with the laws of the state in which it was executed but such execution did not comply with some nonessential formalities as to execution required by the laws of the state in which lands devised by the will were situate is valid and entitled to probate in the latter state.—*Wattenbarger v. Wattenbarger*, 39 Okla. 531, 135 Pac. 1142. The probate of a will in one state does not establish its validity as a will devising real estate in another state unless the laws of the latter permit it so that until the provision of the law of Colorado on the subject be complied with it can not be assumed that a will admitted to probate in another state is valid for the purpose of devising real estate in Montana.—*Sayre v. Sage*, 47 Colo. 559, 108 Pac. 163. The probating in the state of Washington of the will of a non-resident leaving property in that state is not ancillary to such proceedings in the state of his domicile.—*Alaska, etc., Co. v. Noyes*, 64 Wash. 672, 117 Pac. 495.

REFERENCES.

Statutes providing for the allowance or recording of wills admitted to probate in another jurisdiction, upon the production of a duly authenticated copy, do not apply where the testator's domicile at the time of his death was within the state.—See note 1 L. R. A. (N. S.) 996: Probate of foreign wills, proceedings and proof on production of.—See notes Kerr's Cal. Cyc. Code Civ. Proc., §§ 1322, 1323, 1324. Probate of foreign wills.—See note 113 Am. St. Rep. 211-216.

2. Jurisdiction of courts.—Each state has primary power, with respect to the administration and disposition of the estates of deceased persons, as to all property of such persons found within its jurisdiction. Thus the courts of a state may and do grant original probate of wills of deceased non-residents who leave property within that state. In California, this is expressly provided for, by statute, and the rule in many of the other states is the same.—Estate of Clark, 148 Cal. 108, 113 Am. St. Rep. 197, 7 Ann. Cas. 306, 1 L. R. A. (N. S.) 996, 82 Pac. 760.

3. Effect of foreign judgment.—A judgment admitting the will to probate is valid in all other states only as to the property within the jurisdiction of the court pronouncing the judgment. It has no extra-territorial force, establishes nothing beyond that, and does not dispense with, nor abrogate, the formalities and proofs which may be exacted by other jurisdictions in which the deceased also left property subject to their laws of administration.—Estate of Clark, 148 Cal. 108, 112, 113 Am. St. Rep. 197, 1 L. R. A. (N. S.) 996, 7 Am. Ann. Cas. 306, 82 Pac. 760. Under the Oregon statute, if a will pertaining to realty in that state, is probated elsewhere, certified copies of the will and probate may be recorded in the same manner as wills executed and probated in that state, and are thereafter entitled to be admitted in evidence in the same manner and with like effect. Where, however, a will is not attested in the manner required by the laws of that state, it is not entitled to probate, and is wholly insufficient as a muniment to convey title to such realty.—Montague v. Schieffelin, 46 Or. 413, 80 Pac. 654, 655. It is held, in a Montana case, that a decree of the California court admitting a will to probate, even though the will devises real estate situated in Montana, is conclusive upon the courts of Montana having probate jurisdiction; and the questions of the testamentary capacity of the testator and his freedom from duress, fraud, misrepresentation, or undue influence, when executing such foreign will, are foreclosed by the decree of the foreign court upon proceedings on a contest of the same will in the domestic court.—State v. District Court, 34 Mont. 96, 115 Am. St. Rep. 510, 9 Ann. Cas. 418, 6 L. R. A. (N. S.) 617, 85 Pac. 866, 869. A judgment admitting to probate in Texas a will, executed in Texas, is sufficient as basis for a judgment in Kansas admitting a will to probate in the state last named, if the appropriate Texas statute provides that citation of the parties interested is to be served in a particular way, and for a certain length of time and the Texas judgment recites that "said application is in due form

and service of citation has been served and returned in the manner and for the length of time required by law."—*Barnes v. Brownlee*, 97 Kan. 517, 155 Pac. 962.

REFERENCES.

Ancillary probate of will of resident which has been probated abroad.—See note 7 Am. & Eng. Ann. Cas. 313. Conclusiveness of foreign probate as affecting real property.—See note 6 L. R. A. (N. S.) 617-620. Effect of probate of will in another state.—See note 73 Am. Dec. 53-62, 48 L. R. A. 130-153. Foreign will probated abroad, conclusiveness of, in domestic courts.—See note 9 Am. & Eng. Ann. Cas. 422.

4. Instrument when not entitled to probate as such.—Where a testator, a resident of this state, while temporarily absent from the state, executes a will in another state, which will is in conformity with the laws of both this and the foreign state, such will is entitled to be admitted to probate, originally, in the superior court of the county in this state in which the testator had his residence, and is not entitled to admission as a foreign will.—*Estate of Clark*, 148 Cal. 108, 110, 113 Am. St. Rep. 197, 1 L. R. A. (N. S.) 996, 7 Ann. Cas. 306, 82 Pac. 760. It is the duty of the court, in probate, to refuse to probate a will offered as a foreign will, if the court is satisfied, from the evidence, that the testator was, in fact, a resident of this state at the time of his death.—*Estate of Clark*, 148 Cal. 108, 113 Am. St. Rep. 197, 7 Ann. Cas. 306, 1 L. R. A. (N. S.) 996, 82 Pac. 760, 763.

5. Issues to be determined.—When a foreign will is offered for probate, under the California statute, two questions are open, as new and original questions for the determination of the probate court: 1. The sufficiency of the proofs of foreign probate. 2. The question of the residence of the deceased. For, if, upon the question of residence, it should be determined that the testator was in truth a resident of this state, it follows, of necessity, that the domestic state court has exclusive, original, and primary jurisdiction to admit the will to probate, and will not admit it as a foreign will on ancillary proceedings.—*Estate of Clark*, 148 Cal. 108, 113 Am. St. Rep. 197, 1 L. R. A. 996, 7 Ann. Cas. 306, 82 Pac. 760, 762.

CHAPTER IV.

CONTESTING WILL AFTER PROBATE.

- § 1011. Contest of probate within one year.
- § 1012. Form. Petition to revoke the probate of a will.
- § 1013. Form. Petition to revoke probate of will and for probate of later will.
- § 1014. Citation to be issued to interested parties.
- § 1015. Form. Order, on application to revoke probate of will, that a citation issue.
- § 1016. Form. Citation on application to revoke probate of will.
- § 1017. Trial of issues of fact.
- § 1018. Petition to revoke probate of will. How tried. Judgment.
- § 1019. Form. Order revoking probate of will.
- § 1020. Revocation of probate. Effect of.
- § 1021. Costs and expenses, by whom paid.
- § 1022. Probate, when conclusive.

CONTEST AFTER PROBATE.

- | | |
|--|---|
| 1. In general. | (4) Of undue influence. |
| 2. Nature of proceedings. | (5) Weight of. |
| 3. Parties. | (6) Sufficiency of, to support will. |
| 4. What is a contest. | |
| 5. Petition. | 18. Heirs and insane persons as witnesses. |
| 6. Citation. Dismissal of proceedings. | 19. Effect of revocation of probate. |
| 7. Notice. | 20. Costs in contest after probate. |
| 8. Jurisdiction. | 21. Nonsuit and dismissal. |
| 9. Single question involved. | 22. Collateral attack. |
| 10. Time. Limitation of action. | 23. Right to maintain second contest. |
| (1) In general. | 24. Contest of foreign will. |
| (2) Effect of amending petition. | 25. New trial. |
| (3) Delay in prosecuting contest. | 26. Vacating decree. |
| 11. Estoppel to contest. | 27. Appeal. |
| 12. Intervention. | (1) In general. |
| 13. Pleadings. | (2) Right of appeal. |
| 14. Issues. | (3) Appealable orders. |
| 15. Trial. | (4) Notice of appeal. |
| (1) In general. | (5) Record. |
| (2) Instructions. | (6) Review of evidence. |
| (3) By jury. | (7) Review of instructions. |
| (4) Directing a verdict. | (8) Review of findings and verdict. |
| 16. Burden of proof. | (9) Presumptions. |
| 17. Evidence. | (10) Consideration on appeal. |
| (1) Presumptions. | (11) Reversal. |
| (2) In general. | 28. Suit in equity. Action to contest will. |
| (3) Of mental condition. | |

§ 1011. Contest of probate within one year.

When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved, a petition in writing containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked.—*Kerr's Cyc. Code Civ. Proc.*, § 1327.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 578.

Arizona*—Revised Statutes of 1913, paragraph 758.

Idaho*—Compiled Statutes of 1919, section 7462.

Kansas—General Statutes of 1915, section 11775; as amended by Laws of 1917, chapter 336, page 493 (limitation of action to contest after probate).

Montana*—Revised Codes of 1907, section 7407.

New Mexico—Statutes of 1915, section 5890.

North Dakota—Compiled Laws of 1913, section 8649.

Oklahoma—Revised Laws of 1910, section 6207.

Oregon—Lord's Oregon Laws, sections 1143, 7334.

South Dakota—Compiled Laws of 1913, section 5680.

Utah—Compiled Laws of 1907, section 3796.

Washington—Laws of 1917, chapter 156, page 646, section 15.

Wyoming*—Compiled Statutes of 1910, section 5445.

§ 1012. Form. Petition to revoke the probate of a will.

[Title of court.]

[Title of estate.]

{ No. ——. ¹ Dept. No. ——.
 [Title of form.]

To the Honorable the —— ² Court of the County ³ of ——, State of ——.

The undersigned, your petitioner, respectfully alleges:

That —— died in the county ⁴ of ——, state of ——, on the —— day of ——, 19—; that, at the time of his death, he was a resident of said county ⁵ and state; that on the —— day of ——, 19—, an order of this court was made admitting to probate a certain written instrument dated ——, 19—, purporting to be the last will of said ——, deceased; that on the —— day of ——, 19—, said court

made an order appointing said —, executor of said will; that letters testamentary were issued to the said —; that the said —, qualified as executor; and that he is now administering said estate;

That your petitioner is a son⁶ of decedent, and is informed and believes, and upon such information and belief alleges the fact to be, that such written instrument admitted to probate as aforesaid was, and is now, the last will of said deceased; but avers that the petitioner for probate had, at the time of such proof, and still has, in his possession another will of said deceased made by him after he signed the instrument admitted to probate as aforesaid.⁷

Wherefore petitioner prays that both the order authorizing the issuance of letters testamentary to said executor, and the probate of said pretended will, be revoked and set aside.

—, Attorney for Petitioner.

—, Petitioner.

Explanatory notes.—¹ Give file number. ² Title of court. ³ Or, City and County. ^{4, 5} Or, city and county. ⁶ Or, other person interested in said estate. ⁷ Or, that the instrument was forged, and that the signature of decedent thereto was falsely and fraudulently signed by another after the former's death. Give particulars as to any other will in the possession of the petitioner for probate, or any will discovered since the probate of the former will, etc.

§ 1013. Form. Petition to revoke probate of will and for probate of later will.

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

To the Honorable the —² Court of the County³ of —, State of —.

The undersigned, your petitioner, respectfully alleges:

That — died in the county⁴ of —, state of —, on the — day of —, 19—; that, at the time of his death, he was a resident of said county⁵ and state; that on the — day of —, 19—, an order of this court was made

admitting to probate a certain written instrument, dated —, 19—, purporting to be the last will of said —, deceased; that on the — day of —, 19—, said court made an order appointing — executor of said purported last will; that letters testamentary were issued to the said —; that the said — qualified as such executor; and that he is now acting professedly as executor of the said purported last will of said deceased;

That said written instrument was not the last will and testament of said decedent; that since the entry of said orders, another, a later, and the last will of said decedent, dated —, 19—, has been discovered; that said last-named last will was duly published by decedent, in his lifetime, and authenticated as required by law; and that the same is now presented to this court for probate and filed herewith;

That said —, at the time of his death, left property in the said county ⁶ of —, state of —; that the character of said property and probable revenue therefrom are as follows, to wit, —;⁷ and that the estate and effects in respect to which the probate of the will is herein applied for do not exceed in value the sum of — dollars (\$—).⁸

That your petitioner is an heir at law ⁹ of said decedent, and interested in the estate left by him;

That petitioner is named in the said last-named last will and testament as executor thereof, and that he consents to act as such executor;¹⁰

That the names, ages, and residences of the devisees and legatees under said will are as follows, to wit,—

Names.	Approximate ages.	Residences.
—	—	—
—	—	—

That the subscribing witnesses to the said last-named last will and testament are —, residing in the county ¹¹

of —, state of —, and —, residing in the county ¹² of —, in said state;

That the next of kind of said testator, whom your petitioner is advised and believes, and therefore alleges to be, the heirs at law of said testator, and the names, ages, and residences of said heirs, so far as known to your petitioner, are as follows, to wit,—

Names.	Approximate ages.	Residences.
—	—	—
—	—	—

That at the time said last-named last will was executed, to wit, on the — day of —, 19—, the said testator was over the age of eighteen (18) years, to wit, of the age of — (—) years, or thereabouts, and was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, and was in every respect competent, by last will, to dispose of all his estate;

That said will is in writing, signed by the said testator and attested by said subscribing witnesses, at the request of said testator, subscribing their names to the said will in the presence of said testator and in the presence of each other, and your petitioner is advised, and therefore alleges, that said witnesses, at the time of attesting the execution of said will, were and are now competent.

Wherefore your petitioner prays that the probate of said written instrument, hereinbefore first referred to, be revoked; that the letters testamentary issued to said — as aforesaid also be revoked; that the written instrument hereinbefore referred to as the last will of said deceased, and dated the — day of —, 19—, be admitted to probate; and that letters testamentary thereon be issued to petitioner, the person named therein as executor thereof.

—, Petitioner.

—, Attorney for Petitioner.

Explanatory notes.—1 Give file number. 2 Title of court. 3 Or, City and County. 4-6 Or, city and county. 7 State revenue. 8 Give value.
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⁹ Or, legatee, or devisee, or other person interested in the estate.

¹⁰ Or, renounces his right to letters testamentary. 11, 12 Or, city and county.

§ 1014. Citation to be issued to interested parties.

Upon filing the petition, and within one year after such probate, a citation must be issued to the executor of the will, or to the administrator with the will annexed, and to all the legatees and devisees mentioned in the will, and heirs residing in the state, so far as known to the petitioner or to their guardians, if any of them are minors, or to their personal representatives, if any of them are dead, requiring them to appear before the court on some day therein specified, to show cause why the probate of the will should not be revoked.—*Kerr's Cyc. Code Civ. Proc.*, § 1328.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 759.

Idaho—Compiled Statutes of 1919, section 7463.

Montana—Revised Codes of 1907, section 7408.

North Dakota—Compiled Laws of 1913, section 8649.

Oklahoma—Revised Laws of 1910, section 6220.

South Dakota—Compiled Laws of 1913, section 5681.

Utah—Compiled Laws of 1907, section 3797.

Washington—Laws of 1917, chapter 156, page 647, section 16.

Wyoming—Compiled Statutes of 1910, section 5446.

§ 1015. Form. Order, on application to revoke probate of will, that a citation issue.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

—, one of the legatees ² under the will of said deceased, having filed in this court a petition, praying that the probate of said will be revoked,—

It is ordered, That a citation issue to —, the executor of said will, and to —, —, and —, all the legatees and devisees mentioned in said will, and to —, —, and —, all his heirs at law residing in this state, so far

as known, directing them to appear in this court, at the court-room thereof, at —, ³ on the — day of —, 19—, at the hour of — o'clock in the forenoon ⁴ of said day, and show cause, if any they can, why the probate of said will should not be revoked.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—1 Give file number. 2 Or, heir at law, or other person interested. 3 State location of court-room. 4 Or, afternoon, as the case may be.

§ 1016. Form. Citation on application to revoke probate of will.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

To —, the executor of the last will of —, deceased, —, —, and —, legatees and devisees mentioned in said will, and —, —, and —, heirs at law of said decedent,—

You and each of you are hereby notified, That — has filed, in the above-entitled court, a petition to have the will of said deceased revoked; and

You are hereby cited to appear before said court, at the court-room thereof, at —, ² on the — day of —, 19—, at the hour of — o'clock in the forenoon ³ of said day, and show cause, if any you have, why the probate of said will should not be revoked.

—, Clerk of the — Court.

[Seal]

By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2 State location of court-room. 3 Or, afternoon.

§ 1017. Trial of issues of fact.

At the time appointed for showing cause, or at any time to which the hearing is postponed, proof having been made of service of the citation upon all of the persons named therein, the court must proceed to try the

issues of fact joined in the same manner as an original contest of a will.—*Kerr's Cyc. Code Civ. Proc.*, § 1329.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 760.

Idaho—Compiled Statutes of 1919, section 7464.

Montana—Revised Codes of 1907, section 7409.

North Dakota—Compiled Laws of 1913, section 8649.

South Dakota—Compiled Laws of 1913, section 5683.

Washington—Laws of 1917, chapter 156, page 646, section 15.

Wyoming—Compiled Statutes of 1910, section 5447.

§ 1018. Petition to revoke probate of will. How tried. Judgment.

In all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, on written demand of either party, filed three days prior to the hearing, a trial by jury must be had, as in cases of the contest of an original petition to admit a will to probate. If, upon hearing the proofs of the parties, the jury shall find, or, if no jury is had, the court shall decide, that the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked.—*Kerr's Cyc. Code Civ. Proc.*, § 1330.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 761.

Colorado—Mills's Statutes of 1912, section 7895.

Idaho*—Compiled Statutes of 1919, section 7465.

Montana*—Revised Codes of 1907, section 7410.

North Dakota—Compiled Laws of 1913, section 8649.

Washington—Laws of 1917, chapter 156, page 647, section 18.

Wyoming—Compiled Statutes of 1910, section 5448.

§ 1019. Form. Order revoking probate of will.

[Title of court.]

[Title of estate.]

{ No. ——.1 Dept. No. ——. }
 { [Title of form.] }

This court having, on the — day of —, 19—, admitted to probate a certain instrument in writing as the

last will of —, deceased, and having directed letters testamentary thereon to issue to —; and the petition of —, heretofore filed herein, wherein he contests the validity of said written instrument, and prays that its probate as the last will of said —, deceased, be revoked, coming on regularly this day ² to be heard;

And it being shown to the court that a citation was duly issued to said —, and to all persons interested in said estate, residing in this state, requiring them to show cause, at a time and place specified in said citation, why the probate of said will should not be revoked; and that said citation was duly served upon all the parties named;

And it appearing that all necessary and proper orders in the premises have been made; that all of said parties have appeared herein as required in said citation; and that an answer to said petition has been filed,³ the court proceeds to hear the allegations and proofs of the parties, and, after such hearing, no jury having been demanded, finds that said petition was filed within the time prescribed by law; and that said written instrument was not executed and attested in the manner required by law ⁴ and is not the last will of —, deceased:

It is therefore ordered, That the said probate of said will, and the letters testamentary issued thereon be, and the same are hereby, annulled and revoked; that the costs of all the parties to this proceeding and the expenses thereof be paid by the said executor out of the estate of said deceased; that said petitioner, —, be, and he is hereby, appointed administrator de bonis non of said estate; and that letters issue to him upon his taking the oath required by law and giving bond in the sum of — dollars (\$—).

Entered ⁵ —, 19—.

—, County Clerk.

By —, Deputy.

Explanatory notes.—¹ Give file number. ² Or, having been continued to the present time by order of the court. ³ If a jury has been demanded, as authorized by law, and the findings and verdict are that

said instrument was not the last will and testament of —, deceased, continue down to the order as follows: and a jury, having been demanded, "was impaneled and sworn, and proceeded to try the issues presented by said petition and the answer thereto; and the findings and verdict of said jury having been filed, in pursuance of said findings and verdict," it is ordered, etc. 4 Or, is a forged instrument, falsely and fraudulently made by —, after the testator's death; or otherwise, according to the fact. 5 Orders or decrees need not be entered. See § 77, ante.

§ 1020. Revocation of probate. Effect of.

Upon the revocation being made, the powers of the executor or administrator with the will annexed must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation.—*Kerr's Cyc. Code Civ. Proc.*, § 1331.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 762.

Colorado—Mills's Statutes of 1912, section 7907.

Idaho*—Compiled Statutes of 1919, section 7466.

Montana*—Revised Codes of 1907, section 7411.

North Dakota—Compiled Laws of 1913, sections 8649, 8697.

Oklahoma*—Revised Laws of 1910, section 6223.

South Dakota*—Compiled Laws of 1913, section 5684.

Washington—Laws of 1917, chapter 156, pages 646, 648, section 19.

Wyoming*—Compiled Statutes of 1910, section 5449.

§ 1021. Costs and expenses, by whom paid.

The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs.—*Kerr's Cyc. Code Civ. Proc.*, § 1332.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 763.

Idaho*—Compiled Statutes of 1919, section 7467.

Montana*—Revised Codes of 1907, section 7412.

North Dakota—Compiled Laws of 1913, section 8649.

Oklahoma*—Revised Laws of 1910, section 6224.

South Dakota*—Compiled Laws of 1913, section 5685.

Washington—Laws of 1917, chapter 156, page 648, section 19.

Wyoming*—Compiled Statutes of 1910, section 5450.

§ 1022. Probate, when conclusive.

If no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed.—*Kerr's Cyc. Code Civ. Proc.*, § 1333.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 764.

Colorado—Mills's Statutes of 1912, section 7894.

Idaho*—Compiled Statutes of 1919, section 7468.

Kansas—General Statutes of 1909, section 11774.

Montana*—Revised Codes of 1907, section 7413.

New Mexico—Statutes of 1915, section 5890.

North Dakota—Compiled Laws of 1913, section 8650.

Oklahoma*—Revised Laws of 1910, section 6225.

South Dakota*—Compiled Laws of 1913, section 5686.

Wyoming*—Compiled Statutes of 1910, section 5451.

CONTEST AFTER PROBATE.

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| 1. In general. | 17. Evidence. |
| 2. Nature of proceedings. | (1) Presumptions. |
| 3. Parties. | (2) In general. |
| 4. What is a contest. | (3) Of mental condition. |
| 5. Petition. | (4) Of undue influence. |
| 6. Citation. Dismissal of proceedings. | (5) Weight of. |
| 7. Notice. | (6) Sufficiency of, to support will. |
| 8. Jurisdiction. | 18. Heirs and insane persons as witnesses. |
| 9. Single question involved. | 19. Effect of revocation of probate. |
| 10. Time. Limitation of action. | 20. Costs in contest after probate. |
| (1) In general. | 21. Nonsuit and dismissal. |
| (2) Effect of amending petition. | 22. Collateral attack. |
| (3) Delay in prosecuting contest | 23. Right to maintain second contest. |
| 11. Estoppel to contest. | 24. Contest of foreign will. |
| 12. Intervention. | 25. New trial. |
| 13. Pleadings. | 26. Vacating decree. |
| 14. Issues. | 27. Appeal. |
| 15. Trial. | (1) In general. |
| (1) In general. | (2) Right of appeal. |
| (2) Instructions. | (3) Appealable orders. |
| (3) By jury. | (4) Notice of appeal. |
| (4) Directing a verdict. | (5) Record. |
| 16. Burden of proof. | (6) Review of evidence. |

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| (7) Review of instructions. | (10) Consideration on appeal. |
| (8) Review of findings and verdict. | (11) Reversal. |
| (9) Presumptions. | 28. Suit in equity. Action to contest will. |

1. In general.—The contest of a will, in proceedings to revoke its probate, is a special proceeding.—Estate of Joseph, 118 Cal. 660, 50 Pac. 768; *Carpenter v. Jones*, 121 Cal. 362, 53 Pac. 842; *Estate of Dolbeer*, 153 Cal. 652, 15 Ann. Cas. 207, 96 Pac. 266, 268. A suit to contest a will is a proceeding in rem. The court acquires jurisdiction of the res, and its decree affects the interest therein of all parties who, in fact, have an interest in it.—*Maurer v. Miller*, 77 Kan. 92, 127 Am. St. Rep. 408, 15 Ann. Cas. 663, 93 Pac. 596, 597. The California statute does not give the right to contest a will, after its probate, upon the ground that the court did not have jurisdiction.—*Estate of Dole*, 147 Cal. 188, 81 Pac. 534, 537. The inauguration of the contest of a will admitted to probate does not set the order admitting the will to probate at large. That can only be effected by a successful contest. Upon such contest, the court is not required to take evidence again as to the due execution of the will.—*Estate of McKenna*, 143 Cal. 580, 77 Pac. 461, 465. It is not necessary that the undue influence alleged as a ground of contest should have been exercised by a beneficiary under the will. Undue influence by any one, whether he gains by the will or not, is sufficient ground for setting it aside.—*Estate of Cahill*, 74 Cal. 52, 15 Pac. 364, 366. A will is obtained by undue influence where improper pressure or other unfair conduct has overcome the volition of the testator, and resulted in his executing a paper which represents, in fact, not his will, but that of the person exercising the influence over him.—*Estate of Stoddart*, 174 Cal. 606, 163 Pac. 1010. The right to contest a will, that is had by an heir or other person interested, is based on the illegal loss to him of property or property rights by giving recognition to an instrument depriving him of those rights, which instrument is, for one cause or another, void.—*Estate of Baker*, 170 Cal. 578, 150 Pac. 989. The word "contest" involves the idea, not only of the grounds of attack, but the entire dispute involved in such attack and the defense thereto.—*Estate of Simmons*, 168 Cal. 390, 143 Pac. 697. In a contest of a will on the grounds of undue influence and also of the testator's mental incompetency, the former ground need not be considered after the other is established.—*Estate of Baker*, 176 Cal. 430, 168 Pac. 881. On the contest of a will after probate, the will should be upheld as valid, if properly executed and no undue influence is shown, where the evidence shows that the testator had a sound and disposing mind and memory.—*In re Blackfeather's Estate*, *Campbell v. Prophet*, 54 Okla. 1, 153 Pac. 839. A testator has a right to make an unjust, or an unreasonable, or even a cruel will, and no will may be legally set aside upon the mere establishment of the fact that it is such a will.—*Estate of Martin*, 170 Cal. 657, 151 Pac. 138. Section 6210, Rev. Laws

of Oklahoma, of 1910, defining the procedure in proceedings for the contest of a will, provides that on the trial "the contestant is plaintiff and the petitioner defendant," and a motion to transfer from the superior to the district court, being filed by and on behalf of the contestants, who under the statute are plaintiffs, the order of transfer is not void.—*In re Nichol's Will* (Okla.), 166 Pac. 1087, 1092.

2. *Nature of proceeding.*—Proceedings for proving wills and proceedings for disproving or contesting them are special proceedings, unknown to the common law, given by statute only; the contestant has therefore the rights conferred by the statute, and only those.—*Estate of Baker*, 170 Cal. 578, 150 Pac. 989. A proceeding for the revocation of the probate of a will is in the nature of one in rem; hence, the court has jurisdiction on the filing of the petition.—*Estate of Simmons*, 168 Cal. 390, 395, 143 Pac. 697. A right, such as section 954 of the Code of Civil Procedure declares to be a thing in action arising out of a violation of a property right, which on the death of the owner passes to his personal representative, includes the right to contest a will.—*Estate of Baker*, 170 Cal. 578, 150 Pac. 989.

3. *Parties.*—A proceeding for revocation of probate of a will can not be maintained by any person unless he is in some way interested in the will. If he is a legal heir of the deceased that constitutes a sufficient interest. But if he is not an heir he must show that he has some interest in the estate of the deceased which the will he attacks would jeopardize.—*Estate of Zollikofer*, 167 Cal. 196, 138 Pac. 995. Only persons who, but for the will, would succeed in some degree to the decedent's estate, may, as interested persons, contest the instrument or seek revocation of its probate.—*In re Pepin's Estate*, *Pepin v. Meyer*, 53 Mont. 240, 250, 163 Pac. 104, 107. The right to contest a will survives to the heirs or personal representatives of the heir of the putative testator; hence, the administrator of an heir who, but for the will, would have an interest in the estate has a right to contest the will.—*Ingersoll v. Gourley*, 72 Wash. 462, 472, 130 Pac. 743; and see 78 Wash. 406, Ann. Cas. 1915D, 570, 139 Pac. 207. If a person interested in the estate of a decedent begins a contest of the probate of the latter's will and then dies, the proceeding does not abate by the death, but, under section 385 of the Code of Civil Procedure, may be continued by his representative or successor in interest.—*Estate of Baker*, 170 Cal. 578, 150 Pac. 989. Under the provisions of section 5318, Rev. Codes of Idaho, when a will has been admitted to probate any person interested in the same may at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing containing his allegations and praying for revocation of the probate.—*Hagan v. Sullivan*, 24 Ida. 19, 132 Pac. 106. A woman may sue to vacate a decree of divorce, although her divorced husband be dead, if her purpose in doing so is that she may take pro-

ceedings to contest his will and recover her just share of the estate.—*Dallas v. Luster*, 27 N. D. 450, 147 N. W. 95. Where a husband obtained a void decree of divorce from his wife and afterwards died, the wife has a right subsequently to maintain a suit, based upon the theory of property rights, for the purpose of vacating such decree, in order to establish the fact that she is the widow of the deceased, and entitled to maintain proceedings to contest his will on the ground of fraud and undue influence.—*Dallas v. Luster*, 27 N. D. 450, 147 N. W. 95. A son who conveys all his prospective right, title, interest, and estate as heir, legatee, or devisee, of his mother in and to all of the property of which she might die possessed, and who agreed that he would not thereafter assert any right, title, or interest, as heir or otherwise, to such estate, nor in any manner, or to any extent, dispute or contest any disposition of her property made by deed, contract, or will, is not a party interested in proceedings to revoke the probate of the will of the deceased, and a judgment dismissing the petition of such party is proper.—*Estate of Wickersham*, 153 Cal. 603, 96 Pac. 311, 312. A conveyance of a prospective interest in the estate of an ancestor, and an agreement not to contest any disposition thereof made by the will of such ancestor, is not against public policy, but is valid and binding, if founded on an adequate consideration.—*Estate of Garcelon*, 104 Cal. 570, 32 L. R. A. 595, 43 Am. St. Rep. 134, 38 Pac. 414; *Estate of Wickersham*, 153 Cal. 603, 96 Pac. 311, 314. The state may protect and preserve its contingent interest in an estate by contesting a supposititious will. It is sufficient, if the interest is dependent upon a condition, or is a contingent interest.—*State v. District Court*, 25 Mont. 355, 65 Pac. 120, 122. One suing for a revocation of the probate of a will can not complain of a decree partially distributing the estate among the beneficiaries of the will, if the decree conforms to an agreement between these beneficiaries whereby a sufficient portion of the estate is reserved to satisfy his claim, in case he succeeds in his suit.—*Estate of Hinkel*, 176 Cal. 563, 169 Pac. 70.

4. What is a contest.—A legatee or devisee under a will, who asks to have the instrument construed, does not thereby contest it, so as to be subject to a provision cutting off or curtailing the portion of any contesting beneficiary.—*Estate of Vanderhurst*, 171 Cal. 553, 154 Pac. 5. The offer of a second will, later in date, after the probate of the first will, is not a contest of the latter within the meaning of § 1327 and § 1333, Code Civ. Proc., so as to bar such offer after one year subsequent to the probate of the first will; but the admission to probate of a posterior will requires, under the provisions of § 1423, Code Civ. Proc., the revocation of a pre-existing grant of letters testamentary, the necessity for which revocation differentiates the procedure from a will contest.—*In re Moore's Estate* (Cal.), 182 Pac. 285, 286, 287. A motion by an alleged heir, asking for an order declaring invalid and void a devise under the will to another person, and praying for final settlement of the executor's accounts and distribution

over to the applicant, of all of the estate, is, in effect, a contest of the will, and, where the statute gives the district court exclusive jurisdiction of actions brought to contest wills, the probate court has no jurisdiction to hear or to decide such motion.—*Dean v. Swayne*, 67 Kan. 241, 72 Pac. 780, 781.

REFERENCES.

What amounts to a contest within forfeiture clause in will.—See note 21 L. R. A. (N. S.) 953, 39 L. R. A. (N. S.) 953.

5. *Petition*.—In a proceeding to contest the validity of a will, after the same has been admitted to probate, it is mandatory upon the contestant, under the statute of Oklahoma, to "file in the court in which the will was proved a sworn petition in writing containing his allegations that evidence discovered since the probate of the will, the material facts of which must be set forth, shows the existence of the statutory ground or grounds for contest relied upon to avoid the will."—In *re Impunnubbee's Estate*, 49 Okla. 161, 152 Pac. 346. A petition to revoke the probate of a will is sufficient if it alleges that at the time the testatrix made and subscribed the will she was not "of sound mind or memory, or in any respect capable of making a will." It is not necessary to aver more particularly the character of the insanity. Such a petition is not demurrable for failure to state facts sufficient to constitute a contest for revocation of the will.—*Estate of Kilborn*, 158 Cal. 593, 112 Pac. 52. Petition alleging that testatrix was not of sound mind when she made will held sufficient against demurrer for want of sufficient facts.—In *re Kilborn's Estate*, 158 Cal. 598, 112 Pac. 52. Petition to revoke probate alleging that at time of making of will testator "was not of sound mind or memory, or in any respect capable of making a will," held to sufficiently allege ultimate fact, it not being necessary to aver character of insanity.—In *re Kilborn's Estate*, 158 Cal. 593, 112 Pac. 52. The petition of contest in the instant case was carefully examined and it was held not to set up any legal grounds of contest of the probate of the will offered and probated.—*Brock v. Keifer*, 59 Okla. 5, 157 Pac. 88, 91. Where a petition to set aside the probate of a will under the statute of Oklahoma, is neither signed nor verified, the remedy is by motion to strike the petition from the files and not by general demurrer.—*Scott v. McGirth*, 41 Okla. 520, 139 Pac. 519.

REFERENCES.

Sufficiency of allegations.—See subd. 9, *infra*.

6. *Citation. Dismissal of proceedings*.—As a prerequisite to the maintenance of a contest to revoke the probate of a will, the citation provided for by section 1328 of the Code of Civil Procedure of California must be issued within a year after probate, and the proceeding should be dismissed for any failure in that respect, if there is no voluntary appearance within a year of all persons entitled to a citation.—*Estate of Ricks*, 160 Cal. 467, 117 Pac. 539. It is not necessary that in

the citation served upon a legatee, in proceedings following the filing of a petition for the revocation of the probate of a will, the person served be addressed more particularly than by his proper name.—Estate of Logan, 171 Cal. 357, 153 Pac. 388. In proceedings upon a petition for the revocation of the probate of a will the citation to the executor need not be addressed to him formally as such, provided its contents show it to be intended for him.—Estate of Logan, 171 Cal. 357, 153 Pac. 388. If a petition for the revocation of the probate of a will has been filed within a year from the admission of the will to probate, it is not required that the citation to the executor shall have been served within that time.—Estate of Logan, 171 Cal. 357, 153 Pac. 388. Where, in proceedings for the revocation of the probate of a will, the petitioner fails in his efforts to serve the citation within a year the court may order that additional time for the service be given.—Estate of Logan, 171 Cal. 357, 153 Pac. 388. An executor of and sole beneficiary under a will, who, with the exception of the contestant, was the sole heir of the decedent, waived the right to object to a defective issuance of service of the citation, by voluntarily appearing in the proceeding, within two weeks after the institution of the contest, and filing a demurrer as "the proponent and legatee named in the will."—Estate of Ricks, 160 Cal. 467, 117 Pac. 539. Where a petitioner, for the revocation of the probate of a will, having failed to issue a citation within a year from the probate, moves, on the ground of excusable neglect of self and attorney, to be relieved from the effect of such failure, an affidavit, accompanying the motion, which sets forth that the moving party had "stated all the facts in connection with the said contest" to her attorney, and upon such statement had been advised by him, and believed he had a good case, is sufficient.—Estate of Simmons, 168 Cal. 390, 143 Pac. 697. The refusal of the court to issue a supplemental citation for service on legatees and devisees residing without the state does not affect the jurisdiction of the court to proceed with the trial as to the contestant and such defendants as have been served with citation.—Estate of Land, 166 Cal. 538, 137 Pac. 246. Failure to issue a citation to the executor or administrator with will annexed within one year, as provided by the California Code of Civil Procedure, section 1327, and Statutes of 1907, p. 314, chap. 250, necessitates a dismissal of the proceedings in the absence of a general appearance.—In re Hite's Estate, 155 Cal. 390, 101 Pac. 8. Under section 1328 of the Code of Civil Procedure of California, as amended in 1907, a petition for the revocation of the probate of a will and all proceedings based thereon, will be dismissed unless a citation be issued to the executor of the will or to the administrator with the will annexed within one year after such probate.—Estate of Hite, 155 Cal. 390, 101 Pac. 8. Administrator with will annexed, who appeared only for purpose of moving to dismiss petition for revocation for want of citation, held not to have appeared generally though he did not designate his appearance as special.—In re Hite's Estate, 155 Cal. 390, 101 Pac. 8.

REFERENCES.

Nonsuit and dismissal.—See head-line 21, *infra*. Citation to be issued to parties interested, executors or administrators, etc., upon filing a contest of will after probate.—See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1328.

7. Notice.—It is not necessary for the movant for the dismissal of the petition for the revocation of the probate of a will, to serve notice on all parties who might be affected by petitioner's contest, it being sufficient if petitioner himself is served.—*In re Hite's Estate*, 155 Cal. 390, 101 Pac. 8. Where, in contesting a will after its probate, the statute requires the publication of a notice to heirs for four successive weeks, such requirement is not complied with by a notice published five times in a daily issue of a daily paper, between the dates given, where nothing shows how many publications were made each week.—*In re Will of Dunphy*, *Dunphy v. St. Mary's Hospital*, 60 Colo. 196, 200, 153 Pac. 89.

8. Jurisdiction.—A proceeding to probate a will pending in the United States court at Wewoka, at the time of the admission of the territory of Oklahoma into the Union, which was transferred to the district court of Seminole County and by such court transferred to the county court of Seminole County, and by that court transferred to the county court of Hughes County and was pending in such last named court when a petition to set aside the probate of the will was filed. Held that the county court of Hughes County is the successor in probate matters of the United States court for the Western District of the Indian Territory and the proper court in which to file a petition to set aside the probate of a will probated in the United States court for the Western District of the Indian Territory at Wewoka.—*Scott v. McGirth*, 41 Okla. 520, 139 Pac. 519.

9. Single question involved.—The only thing that courts and juries should be concerned with in will contests is whether or not there was testamentary capacity; they are not warranted in reviewing the disposition of property made by a testator from the fact alone that such disposition was unreasonable, harsh, or unjust.—*In re Blackfeather's Estate*, *Campbell v. Prophet*, 54 Okla. 1, 153 Pac. 839.

10. Time. Limitation of action.

(1) **In general.**—Where a will is admitted to probate without contest, any person interested may, within one year, initiate a contest, and if, upon a hearing, it appears that the will is invalid, or not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked; and, where annulled, it must be set aside in toto as to all parties interested thereunder.—*Clements v. McGinn*, 4 Cal. Unrep. 163, 33 Pac. 920, 922; distinguishing the rule in *Samson v. Samson*, 64 Cal. 327, 30 Pac. 979, and citing and reviewing *Estate of Freud*, 73 Cal. 555, 15 Pac. 135. A will is not open to contest, under the Kansas

statute, where it was probated, and its validity established, more than two years before the attack was made. Besides, where the matter of probate is within the jurisdiction of the probate court, its judgment in the premises is not open to collateral attack.—*Keeler v. Lauer*, 73 Kan. 388, 85 Pac. 541, 544. A will on being admitted to probate is, for one year thereafter, open to contest as invalid; and after that time, no proceedings having been instituted, it can not be attacked by attempts to show from the court records that the probate was irregular.—*Cooper v. Newcomb* (Okla.), 174 Pac. 1029. A statute limiting the time within which an heir may come in and contest the will is to be strictly construed; the statutory notice to heirs by publication is jurisdictional, and the heir's right of action is not barred unless the publication was made substantially as required by law.—*In re Will of Dunphy*, *Dunphy v. St. Mary's Hospital*, 60 Colo. 196, 200, 153 Pac. 89. If no action is taken within the time prescribed by statute, with reference to the contest of a will, there is no jurisdiction to hear and determine a contest begun after that time; even a court has no power, then, to entertain such jurisdiction.—*State v. Superior Court*, 76 Wash. 27, 31, 135 Pac. 494. Section 1327 of the Code of Civil Procedure of California allows a will, which has been admitted to probate, to be contested, by any person interested, within one year after the probate.—*Estate of Baker*, 170 Cal. 578, 150 Pac. 989. If no one appears within the prescribed time and files a petition containing his exceptions to an order admitting a will to probate, such time may be viewed as a statute of limitations, and even equitable relief can not be granted either in the probate proceedings or in an independent action as against the validity of the will after the lapse of the statutory period for contesting the probate, where the ground is such that it might have been presented by way of contest under the statute.—*In re Hoscheid's Estate*, 78 Wash. 309, 314, 139 Pac. 61. Whenever a will has been probated in the common form, it may thereafter be contested in the county court by a direct proceeding for that purpose, if brought within the time limited.—*Mansfield v. Hill*, 56 Or. 400, 408, 107 Pac. 471, 108 Pac. 1007. Where the papers constituting the record upon appeal are the petition to revoke the probate, with date of filing, May 7, 1908, the motions of the parties to dismiss the petition, and the order of dismissal, which recites or finds that the will was admitted to probate by an order "duly given and made on the 4th day of May, 1908," the record shows on its face that the petition to revoke the probate of the will was filed more than one year after the will was admitted to probate, which is forbidden by the terms of section 1327 of the California Code of Civil Procedure.—*Estate of Parsons*, 159 Cal. 425, 114 Pac. 570.

REFERENCES.

Contesting will after probate; limitation of time.—See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1327.

(2) Effect of amending petition.—Amendments to the petition of the contestant may be made to correspond with the proof, even after the

close of the evidence of the contestant, and the deficiency in the contestant's case may be thus corrected upon a motion for a nonsuit, where no objection, other than that the contestant had closed his case, was made to the amendment.—*Richardson v. Moore*, 30 Wash. 406, 71 Pac. 18, 19. In an action to vacate the probate of a will, where the contestants filed an amendment to their contest, setting up facts which they claimed to have constituted undue influence, and where such statements were of entirely new matters, constituting another and independent cause of contest, which could have been presented only within a year after the probate, a demurrer thereto should be sustained, or such amendment should be stricken out or disregarded where filed after the expiration of the year allowed by the statute in which to institute the proceeding.—*Estate of Wilson*, 117 Cal. 262, 49 Pac. 172, 173. The contestants of a will do not have to file their petition within one year from the date of the entry of a void decree.—*Estate of Sullivan*, 40 Wash. 202, 111 Am. St. Rep. 895, 82 Pac. 297, 299. The mere fact that a petition to contest a will was stricken out, and an amendment permitted, after the year expires, does not make it a contest instituted after the year, where the court already has jurisdiction of the subject-matter and of the parties, by permitting the amendment, and where, by virtue of the statute allowing it, jurisdiction is retained. Therefore, a court errs in dismissing a contestant's amended petition on the ground that the contest was not instituted within one year of the probate of the will, where such facts exist.—*Estate of Sullivan*, 40 Wash. 202, 111 Am. St. Rep. 895, 82 Pac. 297, 299. Where an action to set aside a will is commenced within the statutory period, the action is not barred because an amendment to the petition was made after the period had run, where the amendment was merely formal.—*Hoffman v. Steffey*, 10 Kan. App. 574, 61 Pac. 822. In a proceeding to revoke the probate of a will and a codicil, in which a judgment is rendered upholding the will, the allowance of an amendment setting up a new ground of contest directed to matters solely affecting the will is without prejudice to the proponent, notwithstanding such amendment is made more than one year after probate.—*Estate of Ricks*, 160 Cal. 468, 117 Pac. 539. The contest of a will can be begun only within a year after probate; but, if such has been actually begun within that time and, by a misdate of the petition, the contrary appears, upon proof of the error the petition should be corrected and the cause allowed to proceed.—*Hagan v. Sullivan*, 24 Ida. 19, 20, 132 Pac. 106.

(3) **Delay in prosecuting contest.**—Where a petition for the revocation of the probate of a will is filed but three days before the expiration of the year after probate, prescribed by statute in which the same may be filed, and where citation was not issued thereon for an unreasonable period after the filing, such delay makes a *prima facie* case of a lack of diligence on the part of the contestant, and furnishes ample grounds for the dismissal of the petition.—*Estate of Focha*, 8 Cal. App. 576, 97 Pac. 321, 322. When amendments to a petition for the revocation of

the probate of a will are not offered until after the expiration of a year from probate, their denial should not be reversed; unless the circumstances show a very extreme abuse of discretion, and especially is this true where the offered amendments, if allowed, would not have supplied the defects of the original petition.—Estate of Sheppard, 149 Cal. 219, 85 Pac. 312, 313. Revocation proceedings commenced more than one year after admission of will to probate held properly dismissed (Code Civ. Proc., section 1327).—In re Parson's Estate, 159 Cal. 425, 114 Pac. 570. Where a former wife of testator with knowledge of his death within the year after the probate of his will allowed for contest, took no steps reasonably calculated to discover whether he left any estate or any will, or whether his estate had been probated, she was guilty of such laches as would defeat her petition, filed fourteen years thereafter to set aside the probate.—In re Hoscheld's Estate, 78 Wash. 309, 139 Pac. 61, 67.

11. **Estoppel to contest.**—If an heir receives property distributed by a decree to which he was a party, and has received all the benefits provided in the will for him, he is estopped from contesting the validity of the will.—Curtis v. Underwood, 101 Cal. 661, 36 Pac. 110, 112. The rule that where a legatee receives property under the will, he is estopped to deny its validity, has no application if he acted in ignorance of his rights in the premises.—Medill v. Snyder, 61 Kan. 15, 78 Am. St. Rep. 306, 58 Pac. 962, 963. Where the widow, instead of instituting any contest, accepted her legacy under the will, and for an additional valuable consideration, released all claims against her husband's estate, she was thenceforth estopped by these acts from contesting the will, or asserting the invalidity of any provision thereof in the courts of any state.—Rader v. Stubblefield, 43 Wash. 334, 10 Ann. Cas. 20, 86 Pac. 560, 564. The law will not permit an heir, who voluntarily permits the time allowed by law to contest a will to expire, to profit by a successful contest instituted by one whose time has not elapsed.—Spencer v. Spencer, 31 Mont. 631, 79 Pac. 320, 321. A will, providing that anybody who contests it shall not receive any part of the estate, does not estop an heir of the testator to institute such a contest.—Estate of Baker, 176 Cal. 430, 168 Pac. 881.

12. **Intervention.**—A person claiming to be an heir, and interested in the property of the estate, may properly intervene in an action brought to contest the will, to which he was not made a party. This right to intervene and to prosecute the suit to its end, is independent of the right of the plaintiff, and does not depend solely upon the plaintiff's right to maintain the action.—Maurer v. Miller, 77 Kan. 92, 127 Am. St. Rep. 408, 15 Ann. Cas. 663, 93 Pac. 596, 597. Where an action to set aside a will is commenced within the period of the statute, and an heir, after the running of the statute, intervened in the action, and the original plaintiff subsequently abandoned the same, the commencement of the original suit, within the time allowed from the probate of the will, inures to the benefit of the intervenor, and the statute of

limitations, therefore, furnishes no defense to the intervening petition.—*Maurer v. Miller*, 77 Kan. 92, 127 Am. St. Rep. 408, 15 Ann. Cas. 663, 93 Pac. 596, 598.

13. **Pleadings.**—An averment in a petition for the revocation of the probate of a will as follows: "that at the time of signing said supposed will by him the said James Crozier was not of sound and disposing mind, but, on the contrary, said deceased was at said time of unsound mind," is a sufficient averment as against a demurrer.—*Estate of Crozier*, 2 Cal. Unrep. 345, 4 Pac. 412. If it is alleged, in a petition to revoke the probate of a will, that previously an order had been made admitting to probate a will "and a codicil thereto," the date of each instrument being stated, an express admission of these allegations in the answer establishes that the codicil was admitted to probate.—*Estate of Baird*, 176 Cal. 381, 168 Pac. 561.

REFERENCES.

Sufficiency of petition.—See subd. 5, *supra*.

14. **Issues.**—In the contest of a will which has been duly admitted to probate, the same rule governs with regard to issues framed by the pleadings, upon which no evidence is offered, as applies in actions generally. Under this rule, the contestants have the burden of proof to show non-execution, and, where they fail to introduce evidence upon that issue, the presumption from this failure is against them, and it is the duty of the court to find in favor of the due execution upon this presumption.—*Estate of McKenna*, 143 Cal. 580, 77 Pac. 461, 466. The proponent, upon the contest of a will, can not be allowed to object to the form of issues, where he had stipulated as to such issues, unless they are so uncertain as to render it impossible to say what the jury meant by their verdict.—*Estate of Cahill*, 74 Cal. 52, 15 Pac. 364, 366.

15. Trial.

(1) **In general.**—In contesting a will after probate, where the heirs were not served with notice of the probate of the will, but where the contestants invoke the jurisdiction of the court upon the merits of the case, this operates as a general appearance, and the contest should be tried upon its merits.—*In re Blackfeather's Estate*, *Campbell v. Prophet*, 54 Okla. 1, 153 Pac. 839. If, in a contested will case, the question at issue is as to whether or not the testator was afflicted with senile dementia, it is not obligatory on the trial judge to prefer the testimony of medical to that of lay witnesses in making his findings.—*In re Swan's Estate* (Utah), 170 Pac. 452. In a proceeding to revoke a previous order admitting a will to probate, it is a legitimate argument for the contestant's attorney to advance in his address to the jury, that the fact that the testatrix had previously executed similar wills, and was then of sound mind, did not necessarily establish the fact that she was of sound mind when she executed the later will in controversy.—*In re Clark's Estate*, Appeal of O'Barn (Cal.), 181 Pac.

639, 641. In determining whether a will contest should or should not be submitted to a jury, every favorable inference fairly deducible, and every presumption fairly arising from the evidence produced must be considered as facts proved in favor of the contestant.—*Davis v. Davis* (Colo.), 170 Pac. 208. In a will contest, brought by a son of the testator who has been virtually disinherited, the testimony of the lawyer who prepared the will, and at the time urged upon the testator the irrationality of his prejudice against the plaintiff, may be sufficient to take the case to the jury on the questions of undue influence and mental incapacity, which includes that of insane delusions.—*Davis v. Davis* (Colo.), 170 Pac. 208.

(2) *Instructions*.—An instruction in a will contest that the burden is upon the contestant to show by a preponderance of evidence the invalidity of the will was explained by other language in the same instruction defining what is meant by a preponderance of evidence, and it is held that the court did not intend or that the jury could not have understood anything more than was necessary to a finding against the will than a belief resulting from a preponderance of evidence.—*Wood v. Wood*, 25 Wyo. 26, 51, 164 Pac. 844. In a will contest an instruction that unsoundness of mind must be established with "reasonable certainty," if erroneous, was explained if not limited by the statement in the same instruction following immediately thereafter that the evidence of insanity should preponderate, or the will be taken as valid.—*Wood v. Wood*, 25 Wyo. 26, 51, 164 Pac. 844. Where a hostile witness has testified deliberately in disregard of the true circumstances attending the making of a will, the party contesting the will is entitled to an instruction warning the jury in respect to his whole testimony.—*In re Ross' Estate*, *Ross v. Van Dyke*, 179 Cal. 629, 178 Pac. 510. In a proceeding to revoke a previous order admitting a will to probate, a requested instruction, in substance, that, if the testatrix did not have the mental capacity to understand each and all of its provisions (referring to the will), she was not of sound and disposing mind, is properly modified by striking out the words "each and all of" before "its provisions."—*In re Clark's Estate*, *Appeal of O'Barn* (Cal.), 181 Pac. 639, 641. In a proceeding to revoke a previous order admitting a will to probate, and where the execution of the will is admitted, a requested instruction on testamentary capacity, that the jury have a right "to consider the terms and provisions of the will," is properly modified by directing them "to consider all of the evidence."—*In re Clark's Estate*, *Appeal of O'Barn* (Cal.), 181 Pac. 639, 641. In a proceeding to revoke a previous order admitting a will to probate, and where the execution of the will is admitted, it is proper to refuse a requested instruction on testamentary capacity, which improperly suggests that the execution of the will is still in issue.—*In re Clark's Estate*, *Appeal of O'Barn* (Cal.), 181 Pac. 639, 641. The effect of the instructions in a will contest is not to be determined alone upon the statements to which exception is taken, but must be taken as a whole in determining its

natural effect.—*Wood v. Wood*, 25 Wyo. 26, 51, 164 Pac. 844. The right to a trial by jury, secured by the constitution, has no reference to, or bearing upon, proceedings in probate. A contestant in a proceeding for the contest of a will is not legally, or of right, entitled to a jury. The right to a jury trial exists only in those probate proceedings where the statute expressly confers a right to a trial by jury.—*Estate of Dolbeer*, 153 Cal. 652, 15 Ann. Cas. 207, 96 Pac. 266, 268. The jury, in a proceeding for the revocation of the probate of a will upon the ground of undue influence, is, subject to the revisory power of the court, the judge of the facts. The jury is to regard the testimony, and to draw all reasonable inferences therefrom.—*In re Welch's Will*, 6 Cal. App. 44, 91 Pac. 336, 337. In determining whether or not, in a proceeding to contest a will, the evidence produced by the contestant is sufficient to require a submission of the case to the jury, the same rules apply as in civil cases, and every favorable inference fairly deducible, and every favorable presumption fairly arising, from the evidence produced, must be considered as facts proved in favor of the contestants. Upon the contestants' motion to submit the issues of fact, where the evidence is reasonably susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All evidence in favor of the contestants must be taken as true, and, if contradictory evidence has been given, it must be disregarded. If there is any substantial evidence tending to prove, in favor of the contestants, all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits.—*Estate of Arnold*, 147 Cal. 583, 82 Pac. 252; cited and approved in *In re Welch's Will*, 6 Cal. App. 44, 91 Pac. 336, 337. Under the Washington statute, a jury in a will contest is merely advisory to the court. Its verdict, upon any question of facts submitted in a case of this kind, would not be binding upon the court. Consequently, it is in the court's discretion to dispense with the jury at any time it deems proper.—*Rathjens v. Merrill*, 38 Wash. 442, 80 Pac. 754, 757. After a will had been admitted to probate by the county court, appeal was taken to the circuit court and tried before a jury which were unable to agree upon a verdict and were discharged. The court, against objection, thereupon made findings of fact and conclusions of law and entered judgment in favor of the will. It was held that there is no absolute right to trial by jury in the matter of probating a will and that the verdict of the jury is merely advisory, the proceeding not being one at common law but wholly statutory.—*Shaw v. Shaw*, 28 S. D. 223, Ann. Cas. 1914B, 554, 133 N. W. 292. In an action to revoke the probate of a will on the ground of undue influence, if it be conceded that appellants were entitled to show that the persons charged with exercising undue influence entertained feelings of hostility toward the contesting relatives, such evidence could not have availed to make a case sufficient to go to the jury in the absence of anything tending to prove that undue influence has in fact been exer-

cised.—In *re Packer's Estate*, 164 Cal. 525, 129 Pac. 778, 781. A will contest, being in the nature of a suit in equity, neither party can, as a matter of right, demand a jury trial.—*Stevens v. Myers*, 62 Or. 372, 414, 121 Pac. 434, 126 Pac. 29. In a will contest where the testator is proved to have been a man who managed his affairs in his own way, the instrument is not to be set aside merely because the property is not disposed of to the approval of the jury.—*Cook v. Bolduc*, 24 Wyo. 281, 157 Pac. 580, 158 Pac. 266. In determining whether or not a will contest should be submitted to the jury, every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of contestants, and where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants, and all the evidence in favor of contestants must for such purpose be taken as true, and if contradictory evidence has been given it must be disregarded.—*Davis v. Davis (Colo.)*, 170 Pac. 208, 213. Testimony in a contest on the probate of a will examined, and it was held that the testimony of a witness was itself sufficient to take the questions of undue influence and mental incapacity, including the question of insane delusion, to the jury.—*Davis v. Davis (Colo.)*, 170 Pac. 208, 210. In a contest of the will of a man leaving a second wife, and who had been executor of his first wife's will, the jury is not concerned with whether the testator carried out the wishes of the testatrix.—*Cook v. Bolduc*, 24 Wyo. 281, 157 Pac. 580, 158 Pac. 266. In the trial of a will contest where it has not been alleged that the testator was under the influence of liquor when executing the will, it is not error for the court to instruct the jury that "drunkenness itself is a species of insanity"; provided the court shows by further language that the reference is to the effect of habitual drunkenness on the mind.—*Davis v. Davis (Colo.)*, 170 Pac. 208.

REFERENCES.

Right to jury trial of will contest.—See note 15 *Ann. Cas.* 211. Petition to revoke probate, when tried by jury.—See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1330.

(4) *Directing a verdict.*—To warrant the court in directing a verdict it is not necessary that there should be an absence of conflict in the evidence, but an absence of substantial conflict.—*Estate of Caspar, Babik v. Ainley*, 172 Cal. 147, 155 Pac. 631. In proceedings on petition to have the probate of a will revoked, where the issues have been submitted to a jury, it is proper, as in other cases, for the court to direct a verdict, if the proponent's evidence is insufficient.—*Estate of Caspar, Babik v. Ainley*, 172 Cal. 147, 155 Pac. 631. A directed verdict is proper "whenever upon the whole evidence the judge would be compelled to set a contrary verdict aside as unsupported by the evidence."—*Estate of Caspar, Babik v. Ainley*, 172 Cal. 147, 155 Pac. 631. If, in a suit to set aside a will, only one verdict is possible under the evidence,

It is not error for the court to direct the jury to find accordingly.—*Watts v. Louthan*, 62 Colo. 336, 163 Pac. 76.

16. **Burden of proof.**—Where it is claimed that the will in contest has been revoked and superseded by a later one, it is incumbent upon the parties seeking revocation, to prove, by competent testimony, that the instrument of a later date, purporting to be a will, and to have the effect of revoking an earlier one, admitted to be valid, was executed with all the formality prescribed by the statute in the making of a will. They must first show the existence of such an instrument; that it was made in writing by the testator when he was of sound mind and memory; that it was signed by him, at the end thereof, or by some person in his presence, and by his express direction, and attested and subscribed, in his presence, by at least two competent witnesses, who saw the testator subscribe, or heard him acknowledge the same; and that such instrument either, in express terms, revoked the former will, or that its provisions, in devising the property, were so far inconsistent with the earlier will that it would operate as a revocation.—*Caeman v. Van Harke*, 33 Kan. 333, 6 Pac. 620. In a contest of a will, the burden is upon the plaintiffs or contestants to show that the will was invalid by reason of facts alleged as to the manner of the execution, unsoundness of mind, or undue influence at the time the testator made the will. The order admitting the will to probate is not conclusive of facts necessary to support it, but, when the facts appear of record, they must be taken as true until the contrary is shown.—*Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489, 490. Upon the contest of a will theretofore admitted to probate, the burden of proof, to establish every affirmative and negative allegation of facts contained in the contestant's petition, rests upon the contestants, and the proponents are not required to establish the will, *prima facie*, before the contestants are required to introduce any evidence in support of their case.—*Hunt v. Phillips*, 34 Wash. 362, 75 Pac. 970, 971. The burden to prove intestacy, where a will has been established, is upon the one alleging it. Rule applied in case of intestacy set up against intervening executor.—*Boye v. Andrews*, 10 Cal. App. 491, 102 Pac. 551. Where a will has been probated in common form and its validity has been attacked by direct proceedings, it lies on the person propounding the instrument to reprobate the same by original proof as though not probated before, and the burden is on him to show the testator's mental capacity and the formal execution of the will.—*In re Sturtevant's Estate*, *Sturtevant v. Sturtevant* 92 Or. 269, 178 Pac. 192, 180 Pac. 595. A presumption of sanity goes with every one, and the burden of proving unsoundness of mind, in contesting a will rests upon the contestant.—*In re Blackfeather's Estate*, *Campbell v. Prophet*, 54 Okla. 1, 153 Pac. 839. The burden of proof on a person who contests a will on the ground of the testator's insanity does not extend to requiring him to establish his point by such a preponderance of evidence as produces conviction in an unprejudiced mind.—*In re Ross Estate*, *Ross v. Van Dyke*, 179 Cal. 629, 178 Pac. 510.

Where proceedings in contest of a will are instituted after the instrument has been admitted to probate, the burden is on the contestant to prove testamentary incapacity and undue influence, unless previous incompetency has been admitted.—*Wood v. Wood*, 25 Wyo. 26, 164 Pac. 844. In a proceeding to vacate an order admitting a will to probate, on the ground that the testator, when executing the instrument, was mentally incompetent and was unduly and wrongfully influenced, the burden is on the petitioner to establish his contention by a preponderance of the evidence.—*In re Dunn's Will*, 88 Or. 416, 171 Pac. 1173. The burden of proving that the testator was of unsound mind is on the person who contests the will.—*Estate of Clark*, 170 Cal. 418, 149 Pac. 828.

17. Evidence.

(1) *Presumptions*.—Upon the contest of a will after the same is admitted to probate, it is presumed that the testator was of sound and disposing mind.—*Estate of Dole*, 147 Cal. 188, 81 Pac. 534, 535. The presumption of the sanity of the testator is evidence in favor of the proponent of his will upon the trial, and the proponent may rely on that presumption.—*Estate of Johnson*, 152 Cal. 778, 93 Pac. 1015, 1017. The fact that the testator was an aged person in no way operates against the validity of his will; every presumption tends to uphold its validity.—*In re Blackfeather's Estate*, *Campbell v. Prophet*, 54 Okla. 1, 153 Pac. 839.

(2) *In general*.—The testimony of subscribing witnesses to a will may be overcome by any probative facts and circumstances admissible under the ordinary rules of evidence.—*Baird v. Shaffer*, 101 Kan. 585, 587, L. R. A. 1918D, 638, 168 Pac. 836. Wills are favored in the law, and it is a cardinal principle of construction that the testimony to overcome them must be cogent and convincing; the principle governs all cases including those in which mental incompetency, duress, and undue influence are alleged.—*In re Geissler's Estate*, 104 Wash. 452, 177 Pac. 330. Where a will is contested as a forgery, it is competent and admissible (if not too remote in point of time) to prove that the testatrix had repeatedly said that she had made no will, and that she said she intended to bequeath her property to her son and grandchildren, and to prove that she called a scrivener and witnesses shortly before her death for the purpose of making a will, and that she then deferred it, saying "I do not want to do it now, I will wait until I feel better."—*Baird v. Shaffer*, 101 Kan. 585, 591, L. R. A. 1918D, 638, 168 Pac. 836. Declarations of a testator, made subsequently to the execution of the will, can not be received in evidence to change or vary its provisions.—*Francoeur v. Beatty*, 170 Cal. 740, 151 Pac. 123. Where after the filing of an application for the probate of a will, a contest is filed, the contesting party has the right to cross-examine the attesting witnesses in the presence of the jury impaneled to try the issues raised by him.—*In re Hanson's Will*, 50 Utah 207, 167 Pac. 256. Evidence is admissible in a will contest of the testator's declaration made prior to

the execution of the will that he intended to leave his property to the beneficiaries.—*In re Allen's Estate*, *Allen v. Elliott*, 177 Cal. 668, 171 Pac. 686, 688. Under the statute of Oklahoma, providing for the contest of a will after probate, the evidence introduced at such contest must relate to facts discovered after the probate of the will.—*In re Blackfeather's Estate*, *Campbell v. Prophet*, 54 Okla. 1, 153 Pac. 839. The statutes of Idaho contain no provision prescribing the evidence necessary on the hearing of a will contest, except the general rule, applying to all actions brought in a court having jurisdiction, that the facts alleged in the pleading are true.—*Head v. Nixon*, 22 Ida. 765, 773, 128 Pac. 557. Because a physician assures an aged man, downcast over the death of his wife, that he has ten years more to live, is no reason why the same physician should not warn the same man, on his becoming ill a short time afterward, that he may die within a day or so.—*Estate of Clark*, 170 Cal. 418, 149 Pac. 828. A hospital physician may testify that a patient was in a semi-comatose condition when brought to the hospital, and consistently with this testimony, say that the same patient was "absolutely of sound mind" when executing his will some hours afterward.—*Estate of Clark*, 170 Cal. 418, 149 Pac. 828. Under a petition for setting aside the probate of a will, on the ground that the instrument was not the decedent's last will and testament, evidence is admissible to show that there exists a later will revoking the other.—*Melhase v. Melhase*, 87 Or. 590, 171 Pac. 216. Under a petition for setting aside the probate of a will, on the ground that the instrument was not the decedent's last will and testament, the execution of the revoking will may be proved, and testimony be given of its contents, without attempting to probate it as a last will.—*Melhase v. Melhase*, 87 Or. 590, 171 Pac. 216. A will not being ambiguous, the trial court may refuse evidence of the devisor's intentions, and may properly strike from an answer allegations as to what those intentions were.—*Postlethwaite v. Edson*, 102 Kan. 104, 111, 171 Pac. 769. No reproach attaches to an attesting witness to a will who afterwards testifies that the testator was not of sound and disposing mind; provided the testimony proceeds from an honest conviction of duty.—*Davis v. Davis* (Colo.), 170 Pac. 208.

(3) *Of mental condition.*—In a will contest where the ground of the contest is want of sanity on the part of the testator, the presumption of sanity exists in favor of the latter and the burden of proving unsoundness of mind is upon the contestant.—*Estate of McCrellish*, 167 Cal. 711, 717, L. R. A. 1915A, 443, 141 Pac. 257. In a contest of will on the ground of mental incompetency of the testator, it is proper for the court to allow both parties to the controversy great latitude as to the admission of evidence of the conduct, acts, and declarations of the testator, both before and after the execution of the will.—*In re Allen's Estate*, *Allen v. Elliott*, 177 Cal. 668, 171 Pac. 686, 689. Extreme stinginess, repulsive or filthy habits, ill temper, jealousy, a dictatorial and disagreeable disposition, and a propensity to drive hard bargains do

not constitute insanity or unsoundness of mind, although tending to accentuate the inference of unsoundness founded on other circumstances.—Estate of Collins, 174 Cal. 663, 164 Pac. 1110. Under the evidence it is held that the issue of the testamentary incapacity on the ground of mental unsoundness, should not have been allowed by the trial court to go to the jury.—Estate of MacCrellish, 167 Cal. 711, 717, L. R. A. 1915A, 443, 141 Pac. 257. The true test of insanity is mental delusion; and if a person persistently believes supposed facts which have no real existence, and, against all evidence and probability, conducts himself on the assumption of their existence, he is, as to that belief, under a morbid delusion, and delusion in that sense is insanity.—Estate of Collins, 174 Cal. 663, 164 Pac. 1110. Attacks of aphasia and a difficulty in moving the hands and feet may indicate senile deterioration, but not so as to establish, of themselves, the insanity essential to render a person incapable of making contracts or a will.—Estate of Collins, 174 Cal. 663, 164 Pac. 1110. In the contest of a will, executed by a person who is confined in a lunatic asylum, a copy of the commitment, duly certified according to statute, is admissible in evidence as tending to show the testator's mental condition.—Estate of Baker, 176 Cal. 430, 168 Pac. 881. In determining the existence of insane delusions in a will contest it was proper for the jury to consider the nature and temperament of the testator, his advanced age, the circumstance under which statements by him were made, his habits of life, and the general conduct of his daughters toward him.—In re Allen's Estate, Allen v. Elliott, 177 Cal. 668, 171 Pac. 686, 688. The contestant must show that the alleged delusions not only had no foundation in fact, but also that there was no evidence, however slight or inconclusive, of any fact upon which belief could be founded.—In re Allen's Estate, Allen v. Elliott, 177 Cal. 668, 171 Pac. 686, 687. Where, in a will contest, it was charged that the testator possessed an insane delusion that contestants had large sums of money loaned out and in bank, evidence which tended to establish that his belief in that respect was founded in fact and that it was not a delusion, was clearly competent; so also as to an alleged insane delusion that testator had made ample provision in gifts of real estate for contestants, it was proper to admit evidence of the gift of a ranch valued at \$20,000.—In re Allen's Estate, Allen v. Elliott, 177 Cal. 668, 171 Pac. 686, 688. Where a will contest was based on the existence of insane delusions in the mind of the testator, evidence that after the execution of the will, he opposed the marriage of one of the contestants, for whom he had expressly omitted to provide in the will, was admissible.—In re Allen's Estate, Allen v. Elliott, 177 Cal. 668, 171 Pac. 686, 688. It devolved upon the contestant in a will contest on the ground of insane delusions of the testator, to prove not only the existence of such delusions, but that the will was the result of such delusions.—In re Allen's Estate, Allen v. Elliott, 177 Cal. 668, 171 Pac. 686, 689. To prove the incapacity of a person to make a will, it is not sufficient to

show that he had delusions on some subjects, if these delusions did not affect his mind while making his bequests.—In *re Sturtevant's Estate*, *Sturtevant v. Sturtevant*, 92 Or. 269, 178 Pac. 192, 180 Pac. 595. The act of a testator in cutting off a son, while harboring a delusion that he had defrauded him of money, is invalidated only on proof that the delusion was absolutely lacking in foundation of fact.—In *re Sturtevant's Estate*, *Sturtevant v. Sturtevant*, 92 Or. 269, 178 Pac. 192, 180 Pac. 595. When a will is contested on the ground of mental incapacity, in that the testator cut off a son by reason of a delusion that he had embezzled money from him, evidence of the son's honesty is irrelevant; the honesty of the son is not directly in issue.—In *re Sturtevant's Estate*, *Sturtevant v. Sturtevant*, 92 Or. 269, 178 Pac. 192, 180 Pac. 595. In a will contest, on the ground of mental incapacity and undue influence, the testimony of the subscribing witnesses controls, as against that of persons who testify as to occasional acts and words of the testator inconsistent with his having a mind showing testamentary capacity.—In *re Sturtevant's Estate*, *Sturtevant v. Sturtevant*, 92 Or. 269, 178 Pac. 192, 180 Pac. 595. In a suit to invalidate a will, the contention being that it is void on its face and can not be enforced, the instrument may be sustained in respect to the appointment of executors, trustees, and guardians, although there is no proof or allegation that the testator died seised of any property.—In *re McGinnis's Estate*, *McGinnis v. Condron*, 91 Or. 407, 179 Pac. 254. Where it is contended that a testator's mental incompetency had been of long standing and permanent, evidence is admissible to show his condition of mind fifty years before his death.—*Estate of Baker*, 176 Cal. 430, 168 Pac. 881. Where a testator's mental competency is in question, witnesses may testify as to his appearance and manner, as indicating whether he was rational or irrational in either word or action.—*Estate of Baker*, 176 Cal. 430, 168 Pac. 881. If a testator is of sound and disposing mind and memory at the time of making his will, any previous mental condition shown to have existed some days earlier is not evidence contradicting the testimony bearing upon the mental condition of the testator at the time of the execution and publication of the will; such former mental condition is a circumstance which, when supported by other circumstances, may properly be admitted as evidence, but, standing alone, is insufficient to justify an inference that such mental condition continued until the time of making the will, when positive testimony in abundance is to the contrary.—*Morrison v. Castillo* (Ariz.), 173 Pac. 417.

REFERENCES.

Mental incapacity and evidence thereof.—See note following § 1002, ante.

(4) Of undue influence.—The fact that a testator has a deeper affection for one of his relatives than for any others is no evidence of undue influence in case he make a will in favor of such favored relative exclusively.—*Estate of Clark*, 170 Cal. 418, 149 Pac. 828. Clear proof of undue influence is required in order that a solemnly executed

testament may be set aside on that ground.—*Estate of Seller*, 176 Cal. 771, 774, 170 Pac. 1138. The undue influence that will warrant a court in setting aside a will must be proved to be such as destroys the free agency of the testator and substitutes the will of another for his.—*Cook v. Bolduc*, 24 Wyo. 281, 157 Pac. 580, 158 Pac. 266. An attorney who, when summoned by an aged man, is told by him privately how he desires to leave his effects, although declining to execute a will at the time, does not exercise undue influence by bringing the will, made out as directed, with him when responding to a subsequent summons from the old man when sick and then persuading him to sign, the physician joining him and informing the patient that he is probably on his death bed.—*Estate of Clark*, 170 Cal. 418, 149 Pac. 828. In an action to set aside a will on the ground of undue influence under a statute providing that the mode of contesting a will shall be by civil action within two years after the probate of the will, and that the order of probate shall be prima facie evidence of the due attestation, execution, and validity of the will, where there is any evidence tending to establish undue influence, a demurrer to the evidence should be annulled.—*Kerr v. Kerr*, 80 Kan. 83, 101 Pac. 647. In an action to revoke the probating of a will, the evidence held insufficient to show that such will was procured by undue influence, or that the testator did not have sufficient testamentary capacity.—*In re Purcell's Estate*, 164 Cal. 300, 128 Pac. 932, 934. In a will contest where the only evidence of undue influence was testimony that the attorney who drew the will under instructions of the testatrix was a member and trustee of the church organization named as one of the beneficiaries of the will; and that such attorney after declining a request to act as executor and trustee, suggested the trust company which was named by the will, such evidence wholly fails to show undue influence and was insufficient to submit the issue to the jury.—*In re Will of Kalua*, 23 Haw. 149. In this contest of a will after probate it is held that while there was no direct evidence of undue influence, there was proof of circumstances from which the jury might with reason have inferred that the beneficiary of the will and certain other persons conspired to procure the execution of the will, and that, taking advantage of the weak condition of the testator in his last sickness, they prevailed upon him to make his will contrary to his real intentions.—*Estate of Jones*, 166 Cal. 108, 135 Pac. 288. Where a will was contested on the ground of undue influence it was held that the question whether the testatrix was wrong in her opinion and judgment respecting the indebtedness of her son to her had nothing to do with the question of whether or not she was a free agent in making the will and that evidence disputing the claim of indebtedness was not material.—*Hopper v. Sellers*, 91 Kan. 876, 139 Pac. 365. In an action to revoke the probate of a will on the ground of undue influence it is held that the evidence presented by the contestant falls far short of measuring up to the degree of proof required to establish undue influence, or requisite to have warranted the lower court in submitting

the issue to the jury and therefore that a nonsuit was properly granted.—*Estate of Hodgman*, 23 Cal. App. 416, 138 Pac. 111.

REFERENCES.

Undue influence and evidence thereof.—See note following § 1002, ante.

(5) **Weight of evidence.**—The testimony of expert witnesses as to insanity, based on hypothetical questions skillfully framed to call for an answer favorable to the party in whose behalf it is asked, is the weakest and most unsatisfactory sort of evidence.—*Estate of Collins*, 174 Cal. 663, 164 Pac. 1110. Expert and opinion testimony as to the genuineness of handwriting is competent, and the credence and weight to be given to such evidence is for the determination of the jury.—*Baird v. Shaffer*, 101 Kan. 585, 591, L. R. A. 1918D, 638, 168 Pac. 836. The jury only is to judge of the credibility of an attesting witness to a will who testifies that the testator was not of sound and disposing mind.—*Davis v. Davis* (Colo.), 170 Pac. 208.

(6) **Sufficiency of, to support will.**—Of course, a will can not be overturned where the evidence is not sufficient to justify it.—*Terpening v. Beach*, 105 Wash. 270, 177 Pac. 674; *In re Geissler's Estate*, 104 Wash. 452, 177 Pac. 330. A will is not to be set aside merely because its provisions are unfavorable to the parties contesting; or because such provisions are the result of personal dislike, however unreasonable.—*In re Dale's Estate*, *Tobias v. Mathews*, 92 Or. 57, 179 Pac. 274. Proof of imaginings amounting to indications of suffering from some of the infirmities of old age and affliction with certain hallucinations having no relation to the objects of a testator's bounty, and which do not indicate an impairment of the normal testamentary capacity is not sufficient to overthrow a solemnly executed testamentary instrument.—*Estate of MacCrellish*, 167 Cal. 711, 717, L. R. A. 1915A, 443, 141 Pac. 257. In a will contest the instrument is to be held invalid if its preparation is found to have been in the hands of the principal beneficiary, and such person had been looking after the business of the testatrix ever since her husband's death, and had had all her papers in his keeping, and evidence intended to prove that such instrument had been read over to the testatrix is found to be insufficient.—*Stafford v. Sutcliffe*, 103 Kan. 592, 176 Pac. 981.

REFERENCES.

Parol evidence, admissibility of, to show whether living child was unintentionally omitted from will.—See note 8 Am. & Eng. Ann. Cas. 637. Opinions of subscribing witnesses as to testamentary capacity.—See note 39 L. R. A. 715-722. Subscribing witnesses, their competency, and the effect of their testimony opposing, or supporting, a will.—See note 77 Am. St. Rep. 459-480. Evidence upon contest of wills generally.—See notes *Kerr's Cal. Cyc. Civ. Code*, §§ 1270, 1272.

18. **Heirs and insane persons as witnesses.**—Under the Kansas statute, the heirs of a deceased person are incompetent to testify, in a contest of the will, in respect to communications had personally with the deceased.—*Wehe v. Mood*, 68 Kan. 373, 75 Pac. 476. An insane person is competent to be a witness, upon the contest of a will, if he understands the nature of an oath and has sufficient mental power to give a correct account of what he has seen or heard. The question whether a person, who is offered as a witness, is insane at the time goes to the competency of the witness, and is a preliminary question to be decided by the court. A discharge of the witness from an asylum for the insane is *prima facie* evidence of restoration to reason.—*Clements v. McGinn*, 4 Cal. Unrep. 163, 33 Pac. 920, 923. In a contest by the daughter of the testator to revoke the probate of the codicil of a will in which the son was the chief beneficiary, the trial court did not err in not requiring an explanation from the son, where there was no showing by the contestant demanding such explanation; but the evidence shows that the son had nothing to do with procuring his father's signature to the codicil, either before or when it was placed there.—*Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597.

19. **Effect of revocation of probate.**—Upon the revocation of the probate of a will, the letters of administration with the will annexed issued thereon, cease to have any effect, and the estate is subject to administration as if the deceased had died intestate.—*Estate of Graves*, 6 Cal. App. 716, 718, 96 Pac. 792, 793. If the probate of an alleged will, and of letters testamentary, is revoked, and the executor appeals, the statute keeps alive, *ad interim*, appellant's character as executor for the purposes of appeal; but in all other respects, the powers and functions of the executor are suspended when the revocation is entered.—*Estate of Crozier*, 65 Cal. 332, 4 Pac. 109, 110.

REFERENCES.

Effect of revocation of probate.—See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1331. Revocation of probate as a termination of appointment of administrator with the will annexed.—See note 21 *L. R. A.* (N. S.) 975.

20. **Costs in contest after probate.**—Where there is a successful contest after probate, and the legatees or executors acted in good faith, and upon probable grounds in proposing the will for probate, the court may, in its discretion, allow to the unsuccessful proponents, their ordinary costs incurred in endeavoring to establish the will, and make the same a charge against the assets of the estate.—*Estate of Olmstead*, 120 Cal. 452, 52 Pac. 804. In a successful contest, after probate, the court may also, in its discretion, allow the executors, out of the estate, their reasonable costs and expenditures in endeavoring to uphold the will of which they had been appointed executors.—*Estate of McKinney*, 112 Cal. 447, 44 Pac. 743; *Estate of Bump*, 152 Cal. 271, 92 Pac. 642. The court has power to make the costs of an unsuccessful

contest payable out of the assets of the estate; and, in the absence of any showing to the contrary, the appellate court must presume that the action of the court below was properly exercised.—*Estate of Bump*, 152 Cal. 271, 92 Pac. 642. The test of the executor's right to have the costs of his unsuccessful attempt to prevent revocation of probate paid out of the estate is whether he has acted in good faith.—*Estate of Jones*, 166 Cal. 147, 135 Pac. 293. Costs and counsel fees should not be allowed out of the estate of a decedent upon an unsuccessful contest of his will; to make such an allowance would place a reward upon the contest of wills.—*In re Enos' Estate*, 79 Wash. 590, 598, 140 Pac. 677. Where, specific legatees under a will are too poor to employ counsel to defend a suit to set aside the instrument, and the court has authorized the executor to employ the necessary counsel, the counsel fees become a legitimate expense of the estate.—*Chapman v. Kennett*, 94 Kan. 535, 146 Pac. 1153. The discretion of the court, under section 1332 of the Code of Civil Procedure of California, in the allowance of costs and counsel fees upon a proceeding to revoke the probate of a will, can not be exercised in advance of a final disposition of the contest on appeal.—*Estate of Jones*, 166 Cal. 147, 135 Pac. 293. Where a petition is filed for revoking the probate of a will, and additional security is given by the petitioner as being a non-resident, the California statute, C. C. P. section 1036, does not permit the sufficiency of the sureties, as in some other classes of undertakings, to be questioned by way of exception and justification.—*Estate of Baker*, 176 Cal. 430, 168 Pac. 881. Where a statute prescribes an arbitrary rule, requiring costs to be awarded against an unsuccessful contestant in a will contest, but a later statute substitutes a discretionary power in such cases, it is an abuse of discretion to award costs against a contestant who made out a prima facie showing of probable cause for contesting the will; in such a case, the exercise of sound discretion demands that the costs be taxed against the estate and that no attorney's fees be charged to the contestant.—*Eichler's Estate*, *In re*, 102 Wash. 497, 501, 173 Pac. 435. It is an abuse of discretion in proceedings to contest a will after probate for the court to order the costs and attorney fees incurred by the executor in making an unsuccessful defense to be paid out of the estate, if the jury finds that the execution of the will was procured through his fraud and undue influence.—*Estate of Jones*, 166 Cal. 147, 135 Pac. 293.

21. **Nonsuit and dismissal.**—Where the evidence fails to prove a sufficient case to justify a verdict or findings upon an application to revoke the probate of a will, it is not error for the court to refuse to submit special issues to the jury, or to discharge the jury without a verdict, the court thereby practically granting a nonsuit.—*Estate of Morey*, 147 Cal. 495, 82 Pac. 57, 59. In proceedings for the revocation of the probate of a will upon the ground of undue influence, where the trial court, upon motion, granted a nonsuit as against the contestants, the evidence introduced must, for the purpose of the motion,

be considered as true and must be given the greatest probative force to which, according to the law of evidence, it is fairly entitled.—*In re Welch's Will*, 6 Cal. App. 44, 91 Pac. 336, 337. If the jury finds a verdict, upon insufficient evidence, on the issue of unsoundness of mind, in a contest of a will which has been admitted to probate, it is the duty of the court to set such verdict aside, and it is not error for the court, in such a case, to grant a nonsuit.—*Estate of Dole*, 147 Cal. 188, 81 Pac. 534, 536, citing *Downing v. Murray*, 113 Cal. 455, 45 Pac. 869. The contest instituted by the petition to revoke the probate having been filed more than a year after the admission of the will to probate was properly dismissed, and the order dismissing it must be affirmed.—*Estate of Parsons*, 159 Cal. 425, 114 Pac. 570. In considering the evidence before the court on a motion for nonsuit in proceedings for the revocation of the probate of a will, the entire evidence presented is to be viewed from a point most favorable to the contestant, disregard is to be had of contradictory evidence, all facts supporting the case of the contestant must be taken as true, and all presumptions from the evidence and all reasonable inference susceptible of being drawn therefrom must be considered as facts proved in his favor.—*Estate of Hodgdon*, 23 Cal. App. 415, 138 Pac. 111. In determining whether or not in a proceeding to contest a will, the evidence produced by the contestant is sufficient to require the submission of the case to the jury, the same rule applies as in civil cases. Every favorable inference fairly arising from the evidence produced must be considered as proved in favor of the contestant, and where the evidence is fairly susceptible of two constructions, the court must take the view most favorable to the contestant, and if there is any substantial evidence tending to sustain the contest, the contestant is entitled to have the case go to the jury upon its merits and a nonsuit is improper.—*Estate of Daly*, 15 Cal. App. 329, 135 Pac. 953. Section 1313 of the Code of Civil Procedure of California, providing that after the impanelment of a jury in the contest of a will, the trial "must be conducted in accordance with the provisions of part two, title eight, chapter four, of this code," authorizes the granting of a motion for a nonsuit in such contest, in a proper case.—*Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130. Evidence held sufficient for jury on motion for nonsuit in proceeding for revocation of probate.—*In re Daly's Estate*, 15 Cal. App. 329, 114 Pac. 787. In a proceeding to revoke the probate of a will on the grounds of undue influence and fraud, and for the alleged mental incompetency of the testator, in which a motion for nonsuit was granted at the close of the contestant's case, it was held that the evidence was insufficient to establish either of such grounds of contest, or to warrant the submission of the question to the jury.—*Estate of Packer*, 164 Cal. 525, 129 Pac. 778, see, also, *Estate of Purcell*, 164 Cal. 300, 128 Pac. 932. In this proceeding for the revocation of the probate of a will on the ground of undue influence, the evidence presented by the contestant fell far short of measuring up to the degree of proof required to establish

undue influence, or requisite to have warranted the lower court in submitting the issue to a jury; and for these reasons the motion of the respondent for a nonsuit was properly granted.—*Estate of Hodgdon*, 23 Cal. App. 415, 138 Pac. 111. Other legatees and devisees under a will, if any, are not bound by an allegation in a petition to revoke the probate of a will that two persons named were the sole legatees and devisees under a will, who appeared at the hearing of the petition without citation; but in support of the judgment dismissing the petition, and in the absence of a bill of exceptions showing the contrary, it will be assumed that there were other legatees and devisees and that no citation had been issued to them, and that under section 1328, Cal. C. C. P. the court was justified in dismissing the contest on that ground.—*In re Plumb's Estate*, 177 Cal. 300, 170 Pac. 609, 610. Where a testator was over 86 years of age, had had two paralytic strokes, was so feeble that he could not lift his hand to his face, and was so weak mentally as to be unable to bear anything in mind, or to carry on a train of thought, the trial court ought not, on the production of evidence to this effect, have granted a nonsuit.—*In re Ross' Estate*, 173 Cal. 178, 159 Pac. 603. In a will contest, as in other litigation, where a jury has been called in, a motion for a nonsuit should not be granted if the plaintiff has offered evidence substantial in character which, with the aid of legitimate inference therefrom may form the basis for a verdict.—*In re Ross' Estate*, 173 Cal. 178, 159 Pac. 603. It was incumbent on the appellant, in an appeal from an order dismissing a proceeding for the revocation of the probate of a will, who thus attacks the order made, to show by bill of exceptions, or other proper record, such a condition of affairs as would make it appear affirmatively that the court below erred in dismissing the contest.—*In re Plumb's Estate*, 177 Cal. 300, 170 Pac. 609, 610. Where a will and a codicil were contested in a single petition, the proponent had a right to move for a nonsuit, both as to the will and codicil, or as to either, at the close of contestant's case, and if in the opinion of the court the evidence was insufficient to warrant submitting the question of the validity of either instrument to the jury it was the duty of the court to grant a nonsuit accordingly. Upon such nonsuit being granted, even if it applied to only one branch of the contest, the party in whose favor it was ordered was entitled to a judgment thereon.—*Estate of Ricks*, 160 Cal. 450, 117 Pac. 532. If, in proceedings for revoking the probate of a will, citation has not been issued to all the legatees and devisees named in the instrument, the court is justified in dismissing the proceedings.—*Estate of Plumb*, *Plumb v. Woods*, 177 Cal. 300, 170 Pac. 609.

REFERENCES.

Citation and dismissal of proceedings.—See head-line 6, *supra*.

22. Collateral attack.—The contestants of a will, can not, in a collateral proceeding, be allowed to dispute the finding of the court, upon admitting the will to probate, as to the residence of the testator.—*Estate of Dole*, 147 Cal. 188, 81 Pac. 534, 537. A proceeding instituted

for the purpose of revoking the probate of a will on the ground that the court did not have jurisdiction, is collateral, where such probate had become final, except as subject to attack in the manner provided by the statute, and where the statute does not provide that want of jurisdiction is one of the grounds upon which probate may be revoked.—*In re Dole's Estate*, 147 Cal. 188, 81 Pac. 534, 537. The allegations of fraud in the petition for partition of an estate, filed in this case, were insufficient to bring the case within the exception to the general rule entitling the plaintiffs to make a collateral attack upon the judgment probating the will.—*Lucas v. Lucas* (Okla.), 163 Pac. 943.

REFERENCES.

Collateral attack upon right of corporation to take by devise.—See note 4 Prob. Rep. Ann. 674-679. Conclusiveness of probate as res judicata.—See note 21 L. R. A. 680-689.

23. Right to maintain second contest.—A dismissal of the first contest of a will does not deprive the plaintiff of the right to commence and maintain a subsequent contest, based upon other grounds.—*Raleigh v. District Court*, 24 Mont. 306, 81 Am. St. Rep. 431, 61 Pac. 991, 993. Under the Kansas statute of limitation, that: "If any action be commenced within due time and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the sale shall have expired, the plaintiff, or if he die and the cause of action survive, his representatives, may commence anew action within one year after the reversal or failure"; the right to maintain a second suit to contest the probate of a will, after the expiration of two years from the probating of a will, but within one year from the dismissal of the first suit, where the first suit was voluntarily dismissed, and the second proceeding was against the same parties and for the same relief as before, is not preserved to a contestant.—*Medill v. Snyder*, 71 Kan. 590, 81 Pac. 216; construing, also, the statute of wills, giving the right to any person interested to appear and contest the validity of a will within two years after probate thereof. Although the contestant of a will was not barred by the order admitting the will to probate from instituting a new contest at any time within one year after the alleged will was admitted to probate, it can not be held, and indeed is not claimed, that she is not substantially prejudiced by the disregard of her contest before probate. One result of such contest, if successful, would have been to prevent the petitioner for probate from acting as executor without bonds, and, if appointed administrator of the estate of deceased, he would be required to give security for the faithful performance of his duties. As the owner of half of the property of the decedent if the will was invalid, contestant was substantially interested in having proper security for the discharge of his duties by the person administering the estate. She would have no such security under the order appealed from during the pendency of any contest instituted

by her after probate.—*In re Mollenkopf's Estate*, 164 Cal. 576, 129 Pac. 997.

24. Contest of foreign will.—Under the Montana statute, although it does not provide, except by implication, as to contests of wills generally, a foreign will, after it has been admitted to probate, may be contested upon the grounds that the testator, at the time of making such will, was not of sound and disposing mind, or was acting under duress, fraud, or undue influence.—*State v. District Court*, 34 Mont. 96, 115 Am. St. Rep. 510, 9 Ann. Cas. 418, 6 L. R. A. (N. S.) 617, 85 Pac. 866, 867. A "foreign will," in the sense that the term is used in the law, is a will executed in another state by a testator residing there, admitted to probate in such sister state after the death of the testator, and subsequently offered elsewhere for probate.—*State v. District Court*, 34 Mont. 96, 115 Am. St. Rep. 510, 9 Ann. Cas. 418, 6 L. R. A. (N. S.) 617, 85 Pac. 866, 867. If a foreign will is valid, under the laws of South Dakota, in so far as it disposes of personalty in that state, but is revoked by its law in so far as it disposes of realty in that state, the admission of such will to probate in South Dakota is not an adjudication that the will is valid in respect to the disposition of real property in that state; such question however may be determined on final distribution of the estate there being no other opportunity provided by the statute for raising it.—*In re Estate of Kimberly, Cornell v. Burr*, 32 S. D. 1, 9, 141 N. W. 1081. Under the laws of South Dakota, the will of a non-resident single woman who marries after making the same, is thereby revoked as to realty in that state even though it may have been admitted to probate, as a foreign will; as to the personalty, however, in that state the will is valid.—*In re Estate of Kimberly, Cornell v. Burr*, 32 S. D. 1, 9, 141 N. W. 1081. If a foreign will is valid under the statute of South Dakota, so far as concerns personal property, but invalid so far as concerns realty, disposed of by it, its probate must be had under the statute relating to foreign wills, and its revocation, as a will of realty, must be determined after such probate; such determination may reasonably be made at the time of final distribution.—*In re Estate of Kimberly, Cornell v. Burr*, 32 S. D. 1, 9, 141 N. W. 1081.

25. New trial.—The trial court has always had power to grant a new trial on the ground of the insufficiency of the evidence to support the verdict, and a verdict in favor of a person contesting a will, because of alleged undue influence, fraud, and unsoundness of mind, comes within this rule.—*Estate of Bainbridge*, 169 Cal. 166, 146 Pac. 427.

26. Vacating decree.—If a decree refusing to revoke the probate of a will, which decree is appealable under section 963 of the Code of Civil Procedure, is made on the death of the contestant and before the appointment of an administrator, it must be vacated on motion made by such administrator when appointed.—*Estate of Baker*, 170 Cal. 578, 150 Pac. 989.

27. Appeal.

(1) *In general.*—An appeal from an order dismissing a contest was entertained by the appellate court in *Estate of Garcelon*, 104 Cal. 570, 593, 43 Am. St. Rep. 144, 32 L. R. A. 595, 38 Pac. 414. An order revoking an order refusing to admit a will to probate, is a separate and distinct matter from an order revoking letters of administration; the former is non-appealable, but the latter is appealable. Hence, if the two are combined in a single order, such order must be read distributively, and the appeal from the former will be dismissed, but the appeal from the latter will be denied.—*Estate of Bouyssou*, 1 Cal. App. 657, 658, 82 Pac. 1066. Under the Montana statute, an appeal from a judgment for defendants, in proceedings against the executor and others to revoke the probate of a will, must be dismissed where not taken in time, that is, within 60 days after the entry of the judgment.—*In re Reilley's Estate*, 26 Mont. 358, 67 Pac. 1121. An appeal from an order revoking the probate of a will does not revive the powers and functions of the former executor. The effect of an appeal is to stay all proceedings upon the judgment or order appealed from.—*Estate of Crozier*, 65 Cal. 332, 333, 4 Pac. 109. As to effect of probate, see head-line 13, *supra*. The judgment of the trial court, upholding a will, will be reversed where, upon an examination of the evidence, it appears that the will was the result of imposition and undue influence practiced on the testator by the beneficiaries under it, and others acting in their interests.—*Greenwood v. Cline*, 7 Or. 17, 38. An order denying, as against a petitioner for the revocation of the probate of a will, a motion to be relieved, on the ground of excusable neglect, from the effect of a failure to have a citation issued within a year after such probate, is reviewable on appeal from an order dismissing the contest for revocation.—*Estate of Simmons*, 168 Cal. 390, 143 Pac. 697.

(2) *Right of appeal.*—By an amendment of section 963 of the Code of Civil Procedure of California, passed in 1901, the right to appeal in probate matters, as prescribed in the third subdivision of that section, has been enlarged so as to include orders "refusing to revoke" the probate of a will. This amendment removes any question as to the right of appeal from the judgment or order refusing to revoke the probate of a will, and authorities relating to a time anterior to that amendment now have no bearing upon such appeals.—*Hartman v. Smith*, 140 Cal. 461, 74 Pac. 7, 9. It must be observed that, while the entry of a probate order, judgment, or decree only serves the purpose of fixing the time from which an appeal may be taken, it is the judgment, or order, or decree itself, that the statute says may be appealed from. The entry, in the book prescribed by the statute, is no part of the probate order, decree, or judgment; and the entry of such order, decree, or judgment has no relation to the question whether a new right of appeal given therefrom is retroactive. Hence if a statute is passed, giving the right of appeal from orders

or judgments refusing to revoke the probate of a will, where no such appeal existed before, and the order or judgment appealed from is not entered until after the passage of the statute, such statute is not retroactive, in the absence of express direction to that effect.—Estate of Hughston, 133 Cal. 321, 323, 65 Pac. 742, 1039. If one party institutes the contest of a will after probate, another party who fulfills the requirements of the statute may take an appeal, from an adverse decision, to the district court.—In re Blackfeather's Estate, Campbell v. Prophet, 54 Okla. 1, 153 Pac. 839.

(3) **Appealable orders.**—An order dismissing a proceeding for the revocation of the probate of a will is in effect an order "refusing to revoke the probate of a will," and is appealable under section 963, Code of Civil Procedure of California, as amended in 1901.—In re Plumb's Estate, 177 Cal. 300, 170 Pac. 609. If, on the death of a person contesting the probate of a will, an order dismissing the contest is made, on motion of the contestee, the order is virtually one refusing to revoke the probate of a will, which order is appealable.—Estate of Baker, 170 Cal. 578, 150 Pac. 989. An appeal lies from an order dismissing a contest of the probate of a will, on motion made by the contestee following the death of the contestant.—Estate of Baker, 170 Cal. 578, 150 Pac. 989. After a will was admitted to probate, a person, claiming as heir at law of the testator, filed a contest and a petition to have the probate revoked, but failed to have a citation issued or even to apply for its issue; whereupon, in due time a residuary legatee, under the will, served upon the contestant a notice of intention to move for a dismissal of the contest on the ground of failure to have a citation issued within a year from the probate. The contestant then served upon this legatee a notice of the counter-motion to be relieved from the effect of this failure to serve the citation, on the ground of excusable neglect on his part and that of his attorney. The motion to dismiss, and the motion for relief, and the issuance of the citation came on for hearing together, and the court sustained the motion to dismiss, and held that it had no power or jurisdiction to grant the relief asked by the contestant. On appeal, it was contended that the order denying the relief was not appealable, but the supreme court said that it was, and moreover that the court below had the power to grant the relief, on good cause being shown.—Estate of Simmons, 168 Cal. 390, 143 Pac. 697.

(4) **Notice of appeal.**—If the petition of persons, who seek to revoke the probate of a will and to admit to probate another will in its stead, is denied, and one of the contestants appeals, the appeal is ineffective unless the notice of appeal is served on the other contestants; they are interested and necessary parties.—McKay v. Stephens, 81 Wash. 306, 308, 142 Pac. 662. The notice of appeal by the executor from an order denying a motion for a new trial of the contest of a will after probate, is not rendered ineffectual because he inadvertently describes himself therein as the "executor of the estate" of the testator, instead

of the "executor of the will."—*Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762.

(5) *Record*.—On an appeal from an order denying a motion for a new trial of the contest of a will after probate, it is not essential that the papers constituting the judgment-roll or the order denying the motion should be authenticated by being embodied in a bill of exceptions. The judgment-roll in such case should include at least the petition for revocation of the probate, the answer thereto, the verdict of the jury and the judgment, and it is sufficient, under section 953 of the Code of Civil Procedure of California, if such papers are authenticated by the clerk's certificate.—*Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762. The record, on an appeal from an order denying a motion for a new trial of the contest of a will after probate, sufficiently shows that a motion for a new trial was made where the transcript contains a duly certified copy of a minute entry showing that a motion for a new trial was denied, and the statement discloses that it was prepared and settled to be used on the executor's proposed motion for a new trial.—*Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762. Where a judgment invalidating a will, on the ground of undue influence, has been reversed on appeal, as not sustained by the evidence, and an order has thereupon been made admitting the instrument to probate, on appeal from this order the record should not include the proceedings to test the due execution of the will, even though the order was not made by the judge presiding at such proceedings.—*Estate of Stone*, 174 Cal. 778, 164 Pac. 643.

(6) *Review of evidence*.—If there was any substantial evidence tending to prove in favor of contestants all of the facts necessary to make out their case, they were entitled to have the case go to the jury for a verdict on the merits.—*Davis v. Davis* (Colo.), 170 Pac. 208, 213. The testimony of the physician attending a testator in his last illness is to be given weight on the question of testamentary capacity, in a will contest.—*Points v. Nier*, 91 Wash. 20, Ann. Cas. 1918A, 1046, 157 Pac. 44. The testimony of an attesting witness to the effect that in his opinion testator was mentally incompetent, should not be disregarded because in conflict with his attestation, the conflict going to his credibility, and it was not error to instruct the jury to consider such testimony, as well as the fact of the attestation.—*Davis v. Davis* (Colo.), 170 Pac. 208, 213. Because of the recognized difficulty, if not impossibility of establishing either undue influence or mental incapacity by direct or positive evidence, such as is required to establish a tangible physical fact, and that the only positive and affirmative proof to be expected or required is of facts and circumstances from which undue influence or mental incapacity may reasonably be inferred, the rule of liberality in the admission of testimony is observed by the courts of review.—*Davis v. Davis* (Colo.), 170 Pac. 208, 213. In a will contest in which there is no evidence to show fraud or undue influence, but the sole issue is as to whether or not the testator was afflicted with

senile dementia, the finding of the trial court from conflicting evidence, must be sustained on appeal, if sustained by substantial evidence.—*In re Swan's Estate* (Utah), 170 Pac. 452. In a controversy over a will, the validity of which is impeached on the ground of the testator's alleged insanity, the facts as found by the trial judge from much conflicting testimony must, on appeal, be permitted to stand.—*Gulick v. Golder*, 104 Kan. 170, 178 Pac. 617. There is nothing in the statute of Kansas that makes the supreme court of the state a retrier of facts passed upon by the trial court where the conclusion reached is supported by competent testimony.—*Dreisbach v. Spring*, 93 Kan. 240, 243, 144 Pac. 195: Evidence considered and held sufficient to support a finding that testator had testamentary capacity sufficient to execute a will.—*Estate of Seller*, 176 Cal. 771, 774, 170 Pac. 1138. A testator is presumed to have been sane and mentally competent until it is proved that he was otherwise; and the trial judge, who had the advantage of seeing and judging of the witnesses, was best qualified to decide the question where the evidence was conflicting.—*In re Murphy's Estate*, 98 Wash. 548, 168 Pac. 175. Testimony regarding the mental incompetency of the testator that he was a man of advanced years, and that his sight was failing, were not circumstances sufficient to justify the court or jury in setting aside a will.—*In re Packer's Estate*, 164 Cal. 525, 129 Pac. 778, 779.

(7) *Review of instructions.*—In a proceeding to revoke a previous order admitting a will to probate, where the only ground of contest presented at the trial was that, at the time of its execution, the decedent was not mentally competent to make a will, the elimination of the phrase, "then I charge you her mind was unsound," from a requested instruction, is not harmful where the same thing, substantially, was stated in the instruction given.—*In re Clark's Estate*, Appeal of O'Barn (Cal.), 181 Pac. 639, 641. In a proceeding to revoke a previous order admitting a will to probate, where the only ground of contest presented at the trial was that, at the time of its execution, the testatrix was not mentally competent to make a will, rulings as to instructions though they were technically erroneous do not justify a reversal of the judgment admitting the will to probate, where it can not be said that they were prejudicial or that their effect was such as to cause a miscarriage of justice, and where the great preponderance of the evidence was in favor of the proponents.—*In re Clark's Estate*, Appeal of O'Barn (Cal.), 181 Pac. 639, 642.

(8) *Review of findings and verdict.*—In a contest of a daughter of the testator to revoke the probate of a codicil of a will in favor of a son, where the daughter charged undue influence exercised by the son and one of the executors over the testator to cause the execution of the codicil, it is held that the court was fully warranted in finding that there was no conspiracy on their part, nor undue influence exercised by them, or either of them, to cause the execution of the codicil.—*Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597. The findings of the

trial court as to the competency of a testator, in a suit brought by parties to contest a will, should not be disturbed on appeal if supported by a preponderance of the evidence.—*Pond v. Faust*, 95 Wash. 346, 163 Pac. 753. In the proceeding to revoke the probate of a will, the findings on the issue of undue influence covered all the material facts and were sufficient to support the judgment sustaining the probate.—*Estate of Daly*, 166 Cal. 225, 135 Pac. 953. In an action to contest a will, joined with an action to declare a trust in property conveyed by the deceased in his lifetime to the proponent of the will, findings as to undue influence, in procuring the will and conveyances, were sustained.—*Lion v. Berlou*, 57 Kan. 426, 73 Pac. 52, 54. Where the contestants of a will are, upon the issue of blood relationship and heirs, found not to be such, or any relations or heirs, and this finding is not attacked, the same is conclusive, and an appeal by such contestants, where there is no specification of any insufficiency to justify such finding, will be dismissed, upon the ground that such parties are not "aggrieved," within the meaning of the statute.—*Estate of Antoldi*, 7 Cal. Unrep. 211, 81 Pac. 278. Where a probated codicil to a will was contested upon petition of a daughter of the testator to revoke the probate thereof for unsoundness of mind as well as upon other grounds, and the court found that when the codicil was executed the testator was of sound and disposing mind, it is held that though there was evidence that he was then seventy-nine years old, was growing weaker physically, and that there was a gradual impairment of his memory and mental faculties, yet there was other evidence to show his testamentary capacity at that time, and that, as soundness of mind is to be presumed, and as the burden on the contestant to show unsoundness of mind at that time was not sustained, the finding of the court is sufficiently supported.—*Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597. The findings of the trial court, on the question of testamentary capacity, should be approved on appeal if sustained by a preponderance of the evidence.—*Wilson v. Craig*, 86 Wash. 465, 150 Pac. 1179. Where the evidence reasonably supports a finding of testamentary capacity, the same will not be disturbed on appeal.—*Dickey v. Dickey* (Okla.), 168 Pac. 1018, 1020. A finding of the trial court as to the mental soundness of a testator will not be reviewed if the record shows sufficient evidence to sustain it.—*Dreisbach v. Spring*, 93 Kan. 240, 243, 144 Pac. 195. The facts and circumstances relied upon to prove that the signature of the testatrix to a contested will examined and held sufficient to sustain a finding that the signature to the will was not genuine, and held sufficient to impeach and to discredit the evidence of the attesting witnesses.—*Baird v. Shaffer*, 101 Kan. 585, 587, L. R. A. 1918D, 638, 168 Pac. 836. The verdict of a jury in a will contest where the grounds are undue influence and mental incapacity, is of special importance, and should not be disregarded, except for grave reasons, clearly apparent.—*Davis v. Davis* (Colo.), 170 Pac. 208, 213. Every intendment is in favor of the correctness of a judg-

ment or order assailed on appeal, and if an order dismissing proceedings to revoke the probate of a will contain a finding that no citation was issued to all the legatees and devisees named in the will, the reviewing court, on appeal from the order, must be governed by such finding.—*Estate of Plumb, Plumb v. Woods*, 177 Cal. 300, 170 Pac. 609. A finding, in an order dismissing proceedings for revoking the probate of a will, that no citation was issued to all the legatees and devisees named in the will, is not limited by words therein naming certain persons to whom "particularly" no citation was issued.—*Estate of Plumb, Plumb v. Woods*, 177 Cal. 300, 170 Pac. 609. A verdict, on conflicting testimony that a testator was mentally incapable of making a will and executed the instrument under undue influence, will not be disturbed if based on substantial testimony.—*James v. James (Colo.)*, 170 Pac. 285.

(9) **Presumptions.**—Where the bill of exceptions in a will contest fails to state whether statutory proof was made of the execution of the will offered for probate, it will be presumed that the statutes requiring that such proof be made were complied with, and that the execution of the will was sufficiently proved by the subscribing witness.—*Wood v. Wood*, 25 Wyo. 26, 34, 164 Pac. 844. Every intendment is in favor of the correctness of a judgment or order assailed on appeal, and where on appeal from an order dismissing a proceeding to revoke the probate of a will, the order of dismissal contained a recital in the nature of a finding that no citation had been issued to all the devisees and legatees named in the will and particularly that no citation had been issued to the named administrator with the will annexed or to a named legatee: Held, in support of the order that the special finding that the administrator and legatee had never been cited did not limit the effect of the general finding that no citation had been issued to all the parties, and it will be assumed that that was the ground for the courts, and in the absence of a bill of exceptions why such citation was not issued, the order will be sustained.—*In re Plumb's Estate*, 177 Cal. 300, 170 Pac. 609, 610. Where, on appeal from a verdict and judgment sustaining a will, the bill of exceptions does not disclose what, if any, proofs were offered at the trial, but the appellant's brief leaves it to be inferred that the proponents made out a prima facie case, the court will assume the will to have been produced and sufficiently proved.—*Wood v. Wood*, 25 Wyo. 26, 164 Pac. 844.

(10) **Consideration on appeal.**—On an appeal from an order dismissing a petition to revoke the probate of a will, on the ground that it was filed more than one year after the will was admitted to probate, where the record contains no bill of exceptions showing the evidence taken and considered by the court upon the hearing of the motion to dismiss, the only question that can be considered is whether or not the record, or what may be considered as the judgment-roll, is sufficient to sustain the order.—*Estate of Parsons*, 159 Cal. 425, 114 Pac. 570. Defendant in suit to revoke probate held not in position to complain of failure of court to submit to jury any issues except those relating

to undue influence, ruling being in his favor.—*In re Kilborn's Estate*, 158 Cal. 593, 112 Pac. 52. Whether or not the trial court erred in giving a judgment of dismissal in proceedings instituted for the revocation of the probate of a document purporting to be a will, must be determined solely in the light of the facts shown by such papers, in the transcript as may properly be held to constitute a part of the judgment-roll and the settled bill of exceptions. Affidavits contained in the transcript, purporting to have been subsequently filed and used on the motion to set aside the judgment, and for a new trial, can not be considered in the determination of such question.—*Estate of Dean*, 149 Cal. 487, 87 Pac. 13, 14. Held, in a will contest based on undue influence and mental incompetency, that an abstract instruction to the effect that drunkenness itself is a species of insanity, ought to have been omitted, but was not prejudicial error, when considered in connection with the instruction as a whole.—*Davis v. Davis* (Colo.), 170 Pac. 208, 214. Where the contestant fails in his contest, he is not injured by the failure to serve the citation on non-resident legatees and devisees.—*Estate of Land*, 166 Cal. 538, 137 Pac. 246. An objection that the court was not legally in session during the trial of a will contest, based upon the claim that the term had been adjourned *sine die*, made for the first time on appeal, the parties having appeared and without objection proceeded to trial, will not be considered.—*In re Nichol's Will* (Okla.), 166 Pac. 1087, 1092. An inadvertent and improper statement of the ultimate fact to be determined by the court or jury, on the part of a witness giving opinion evidence is not prejudicial error, where associated with language clearly indicating that his only purpose was to give his opinion as to the genuineness of the signature to a will.—*Baird v. Shaffer*, 101 Kan. 585, 590, L. R. A. 1918D, 638, 168 Pac. 836. Construction of a will can not be asked, for the first time, of the reviewing court.—*Dreisbach v. Spring*, 93 Kan. 240, 246, 144 Pac. 195. The *jus disponendi* is such that where testamentary capacity is established or unsuccessfully attacked, the owner of property may dictate to whom it shall go at his death, although the court called on to review his decision may feel that it was unreasonable, unaccountable, harsh, and unjust.—*Dreisbach v. Spring*, 93 Kan. 240, 243, 144 Pac. 195. Proceedings of the probate court, regular and fair upon their face and bearing no evidence of lack of jurisdiction, can not, in the absence of any allegation of fraud or proof to support such an allegation, be considered on appeal to the end that the judgment be disturbed.—*Cooper v. Newcomb* (Okla.), 174 Pac. 1029. In the absence of a bill of exceptions or a reporter's transcript, an appeal from an order dismissing a proceeding for the revocation of the probate of a will must be considered upon the papers which, in a probate proceeding, correspondent to the judgment-roll, which include, at least, the petition or contest, the answer and the judgment or order.—*In re Plumb's Estate*, 177 Cal. 300, 170 Pac. 609, 610.—In the absence of both a bill of exceptions and a reporter transcript from the record, an appeal from

an order dismissing a proceeding to revoke probate must be considered on the papers which, in such a proceeding, correspond to the judgment-roll; these include at least the petition or contest, the answer and the judgment or order, all properly authenticated.—*In re Plumb's Estate*, 177 Cal. 300, 170 Pac. 609, 610. If, in a case of a will contest on the ground of mental incapacity and undue influence, the fact of the trial court's having followed the verdict is entitled to consideration by the reviewing court, such consideration is to be given all the more weight when the appeal is from a second trial of the case, and the verdict has been a repetition of that in the first.—*Davis v. Davis* (Colo.), 170 Pac. 208.

(11) **Reversal.**—In the absence of a statement of the evidence in a will contest, to enable the court to determine whether or not they were prejudicial, the court will not order a reversal for alleged errors in instructions.—*Wood v. Wood*, 25 Wyo. 26, 51, 164 Pac. 844. Section 1314, Cal. Code Civ. Proc., requiring the filing of the testimony of the subscribing witnesses to the will with the order admitting it to probate, is merely directory, and the failure to file such testimony is not ground for reversing the order admitting the will to probate.—*Estate of Seller*, 176 Cal. 771, 775, 170 Pac. 1138.

28. Suit in equity. Action to contest will.—When a man dies, leaving a large estate, and that fact is known to his children, they are charged with notice that the world moves on; and, claiming an interest in his property, they must be likewise charged with knowledge, not only of their own status and rights as affected by the death of their father, but, as well, of the status of the property left by him.—*Nicholson v. Leatham*, 28 Cal. App. 597, 153 Pac. 965, 155 Pac. 98. An order admitting a will to probate can not be set aside and annulled in equity on the ground that the executrix procured such order by fraud, where such suit is not brought until after the expiration of five years from the order, and where the plaintiffs had knowledge of the facts; such a situation shows a lack of due diligence.—*Nicholson v. Leatham*, 28 Cal. App. 597, 153 Pac. 965, 155 Pac. 98. Upon inquiry into the testamentary capacity of a decedent whose will is subject to contest, the period to be considered is mainly that of the making of the will; matters having reference to time before and after are noted merely in aid of the main inquiry.—*Wisner v. Chandler*, 95 Kan. 36, 51, 147 Pac. 849. Questions as to whether the testator had mental capacity to make a will, whether the will was executed by him, and whether he was unduly influenced to execute the will so that it expressed the mind of another rather than his own, are questions of fact, deemed settled by the findings of the trial court.—*Ahnert v. Ahnert*, 98 Kan. 768, 160 Pac. 201. Symptoms of senile dementia may have appeared in a testator before the time of the execution of his will, and further symptoms after such time, these increasing until his death in the course of nineteen months; and yet the testator may be said to have been of disposing mind when

making the will.—*Wisner v. Chandler*, 95 Kan. 36, 62, 147 Pac. 849. Whether a will was reasonable or unreasonable, just or unjust, it was sufficient if it was made according to the forms of law, by one capable in law of making a will and of sound mind and memory at the time.—*In re Hayes's Estate*, 55 Colo. 340, 135 Pac. 453. It is a rule with the courts to assume that a testator was sane, which assumption must be overcome by proof, if at all; and what is proof in such a case, where the evidence is conflicting, is for the trial judge to decide, he having the advantage of hearing the witnesses and noticing their demeanor.—*Pond's Estate v. Faust*, 95 Wash. 346, 163 Pac. 753. Where, in a will contest on the ground of undue influence and the testator's mental incapacity, the instrument has been sustained in all respects save the residuary bequest, the contestants can not be said to be the prevailing parties.—*Chapman v. Kennett*, 94 Kan. 535, 146 Pac. 1153.

CHAPTER V.

PROBATE OF LOST OR DESTROYED WILL.

- § 1023. Proof of lost or destroyed will.
- § 1024. Form. Petition to establish lost or destroyed will.
- § 1025. Form. Petition for establishment of lost or destroyed will, and for revocation of letters of administration.
- § 1026. Form. Petition for establishment of lost or destroyed will, and for revocation of probate of prior will and letters testamentary.
- § 1027. Must have been in existence at time of death.
- § 1028. To be certified, recorded, and letters thereon granted.
- § 1029. Form. Certificate establishing lost or destroyed will.
- § 1030. Restraining order in favor of claimants.

PROBATE OF LOST OR DESTROYED WILL.

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| 1. Pleading destruction or loss. | 5. When presumption as to revocation is overcome. |
| 2. Character of evidence required. | 6. Burden of proof. |
| 3. Proof of execution and contents. | 7. New trial. |
| 4. Presumptions incident to loss or destruction. | 8. Appeal. |

§ 1023. Proof of lost or destroyed will.

Whenever any will is lost or destroyed, the superior court must take proof of the execution and validity thereof and establish the same; notice to all persons interested being first given, as prescribed in regard to proofs of wills in other cases. All the testimony given must be reduced to writing, and signed by the witnesses.

—*Kerr's Cyc. Code Civ. Proc.*, § 1338.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona*—Revised Statutes of 1913, paragraph 766.
- Colorado—Mills's Statutes of 1912, sections 7887, 7888.
- Idaho*—Compiled Statutes of 1919, section 7469.
- Kansas—General Statutes of 1915, sections 11801-11805.
- Montana*—Revised Codes of 1907, section 7414.
- Nevada—Revised Laws of 1912, section 5880.
- North Dakota—Compiled Laws of 1913, section 8643.
- Oklahoma*—Revised Laws of 1910, section 6226.
- South Dakota—Compiled Laws of 1913, section 5687.

Utah—Compiled Laws of 1907, section 3809.

Washington—Laws of 1917, chapter 156, page 648, section 20.

Wyoming—Compiled Statutes of 1910, section 5432.

§ 1024. Form. Petition to establish lost or destroyed will.

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

To the Honorable the — ² Court of the County ³ of —, State of —.

The petition of —, of the county ⁴ of —, state of —, respectfully shows:

That — died on or about the — day of —, 19—, at —;

That said deceased at the time of his death was a resident of the county ⁵ of —, state of —, and left property in the county ⁶ of —, in said state;

That the character of the said property and probable revenue therefrom are as follows, to wit, —;⁷

That the estate and effects in respect to which the probate of the will is herein applied for do not exceed in value the sum of — dollars (\$—);⁸

That deceased in his lifetime made a will which, at the time of his death, had not been revoked and was in existence; but that said will, after the testator's death, was destroyed;⁹

That the provisions of said will can be clearly and distinctly proved by at least two credible witnesses;

That your petitioner is an heir at law ¹⁰ of said deceased, and is interested in his estate;

That petitioner is named in said will as executor thereof, and that he consents ¹¹ to act as such executor;

(Here state the required facts as to devisees and legatees, subscribing witnesses, next of kin, and heirs at law, competency to make a will, and validity of execution of will, as in § 960, ante.)

Wherefore petitioner prays that this court take proof of the execution and validity of said will and establish

the same; that the judge of this court distinctly state and certify, as provided by law, the provisions of said will; that said will so established be admitted to probate; that your petitioner be appointed executor of said last will; and that letters testamentary thereon be issued to this applicant.

—, Attorney for Petitioner.¹² —, Petitioner.

Explanatory notes.—1 Give file number. 2 Title of court. 3 Or, City and County. 4-6 Or, city and county. 7 State character and revenue. 8 Give separate values of real property and personal estate. 9 Or, was accidentally lost; or, was fraudulently destroyed in the lifetime of the testator by —, stating the facts. 10 Or devisee, or legatee, or other person interested in said estate, according to the fact. 11 Or, renounces his right to letters testamentary. 12 Give address.

§ 1025. Form. Petition for establishment of lost or destroyed will, and for revocation of letters of administration.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

(Make allegations the same as in § 1024, prayer excepted, and add:)

That by order of this court made on the — day of —, 19—, letters of administration of said estate were issued to —; that said — immediately qualified as administrator of said estate; and that he is now administering the same.

Wherefore petitioner prays that this court take proof of the execution and validity of said will and establish the same; that the judge of this court distinctly state and certify, as provided by law, the provisions of said will; that said will so established be admitted to probate; that the letters of administration on said estate, granted to —, as aforesaid, be revoked; that your petitioner be appointed executor of said last will; and that letters testamentary thereon be issued to this applicant.

—, Attorney for Petitioner. —, Petitioner.

Explanatory note.—1 Give file number.

§ 1026. Form. Petition for establishment of lost or destroyed will, and for revocation of probate of prior will and letters testamentary.

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.
[Title of form.]

To the Honorable the —. 2 Court of the County 3 of —, State of —.

The undersigned, your petitioner, respectfully alleges:

That — died in the county 4 of —, on the — day of —, 19—; that at the time of his death, he was a resident of said county 5 and state; that on the — day of —, 19—, an order of this court was made admitting to probate a certain written instrument dated —, 19—, purporting to be the last will of said —, deceased; that on the — day of —, 19—, said court made an order appointing — executor of said purported last will; that letters testamentary were issued to the said —; that the said — qualified as such executor; and that he is now acting professedly as executor of the said purported last will of said —, deceased;

That said written instrument was not the last will of said —, deceased; that, subsequent to the making of said orders, there has been discovered the last will of decedent, which bears a later date than the one heretofore admitted to probate as aforesaid; that said last will of —, deceased, so discovered bears date as of —, 19—, was duly published and authenticated as required by law, and that it revokes said former will;

That said last will, bearing date as of —, 19—, had never been revoked, and was in existence at the time of the testator's death, but was, after said time last-named, destroyed by —; 6

That at the time of his death, the said — left estate in the county 7 of —, state of —;

(Here state character and value of property as in § 1024, ante;)

That the provisions of said last will of —, 19—, can be clearly and distinctly proved by at least two credible witnesses;

That your petitioner is an heir at law⁸ of said decedent, and interested in the estate left by him;

That petitioner is named in said last will of —, 19—, as executor thereof, and that he consents to act as such executor;⁹

(Here state the required facts as to devisees and legatees, subscribing witnesses, next of kin and heirs at law, competency to make a will and validity of their execution of will, as in § 960, ante.)

. Wherefore petitioner prays that this court take proof of the execution and validity of said last will of —, 19—, destroyed as aforesaid, and establish the same; that the judge of this court distinctly state and certify, as provided by law, the provisions of said last-named will and testament; that the written instrument heretofore admitted to probate, to wit, on the — day of —, 19—, as the last will of —, deceased, be declared not to be the last will of said —, deceased, and that the probate thereof, and the letters testamentary issued thereunder be revoked; that said will of —, 19—, as established be admitted to probate; that your petitioner be appointed executor thereof; and that letters testamentary thereon be issued to this applicant.

—, Attorney for Petitioner. —, Petitioner.

Explanatory notes.—1 Give file number. 2 Title of court. 3 Or, City and County. 4, 5 Or, city and county. 6 State by whom; or, was fraudulently destroyed by —, during the testator's lifetime. See Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts. to Codes), § 1339. 7 Or, city and county. 8 Or as the case may be. 9 Or renounces his right to letters testamentary, according to the fact.

§ 1027. Must have been in existence at time of death.

No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been

fraudulently or by public calamity destroyed in the lifetime of the testator, without his knowledge, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses;

OF INSANE TESTATOR.—Provided, however, that if the testator be committed to any state hospital for the insane in this state and after such commitment his last will and testament be destroyed by public calamity, and the testator is never restored to competency, then after the death of the said testator, his said last will may be probated as though it were in existence at the time of the death of the testator.

Sec. 2. This act shall take effect and be in force from and after its passage.—*Kerr's Cyc. Code Civ. Proc.*, § 1339.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona—Revised Statutes of 1913, paragraph 767.

Colorado—Mills's Statutes of 1912, section 7887.

Idaho—Compiled Statutes of 1919, section 7470.

Kansas—General Statutes of 1915, sections 11801, 11804.

Montana—Revised Codes of 1907, section 7415.

Nevada—Revised Laws of 1912, section 5881.

North Dakota—Compiled Laws of 1913, section 8643.

Oklahoma—Revised Laws of 1910, section 6227.

South Dakota—Compiled Laws of 1913, section 5688.

Utah—Compiled Laws of 1907, section 3810.

Washington—Laws of 1917, chapter 156, page 648, section 20.

Wyoming—Compiled Statutes of 1910, section 5433.

§ 1028. To be certified, recorded, and letters thereon granted.

When a lost will is established, the provisions thereof must be distinctly stated and certified by the judge, under his hand and the seal of the court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration, with the will annexed, must be issued thereon in the same manner as upon wills produced and duly proved. The testimony must be reduced to writing, signed, certified, and filed as in other cases, and shall have the same effect

as evidence as provided in section one thousand three hundred and sixteen.—*Kerr's Cyc. Code Civ. Proc.*, § 1340.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 768.

Colorado—Mills's Statutes of 1912, sections 7887, 7888.

Idaho—Compiled Statutes of 1919, section 7471.

Kansas—General Statutes of 1915, section 11804.

Montana*—Revised Codes of 1907, section 7416.

North Dakota—Compiled Laws of 1913, sections 8643, 8647.

Oklahoma—Revised Laws of 1910, section 6228.

South Dakota—Compiled Laws of 1913, section 5689.

Utah*—Compiled Laws of 1907, section 3811.

Washington—Laws of 1917, chapter 156, page 648, section 20.

Wyoming—Compiled Statutes of 1910, section 5434.

§ 1029. Form. Certificate establishing lost or destroyed will.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.] }

State of —, }
County ² of —, } ss.

I, —,³ Judge of the — Court of the County ⁴ of —, State of —, do hereby certify:

That on the — day of —, 19—, there was presented in this court, by —, a petition to establish a certain lost ⁵ will as the last will of said —, deceased; that, after due notice given, said petition came on regularly to be heard on the — day of —, 19—,⁶ and, from the proofs taken therein, the court finds as follows:

That on —, 19—, — died in the county ⁷ of —, state of —; that at the time of his death he was a resident of the county ⁸ of —, state of —; that the said decedent in his lifetime, and on or about the — day of —, 19—, in the county ⁹ of —, state of —, duly executed a will, the one alleged in said petition to have been lost,¹⁰ in the presence of — and —, the subscribing witnesses thereto; that the testator acknowledged the same in their presence, and declared the same to be

his last will; and that the said witnesses, at his request and in his presence, and in the presence of each other, attested the same by subscribing their names as witnesses thereto;

That said testator, at the time of executing said will, as aforesaid, was of the age of eighteen (18) years and upwards, was of sound and disposing mind, and was not acting under restraint, undue influence, menace, or fraud, and was not, in any respect, incompetent to devise and bequeath his estate;

That said will was in existence at the time of said testator's death, and had not been annulled or revoked; but that it was lost,¹¹ after its execution and before the testator's death;

That the provisions of said alleged lost will were clearly and distinctly proved by two credible witnesses, namely, — and —, whose testimony was reduced to writing, was signed by said witnesses respectively, and filed herein; and that the provisions of said will, as shown by the testimony of said witnesses, are as follows, namely, —.¹²

In witness whereof, I have granted this certificate under my hand and the seal of the court this — day of —, 19—, and have caused the same to be attested by the clerk of this court under the seal thereof.

—, Judge.

[Seal]

Attest: Clerk of the — Court.

By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2 Or, City and County. 3 Name of judge. 4 Or, city and county. 5 Or, destroyed. 6 Or, which had been regularly continued to said time by order of the court. 7-9 Or, city and county. 10 Or, destroyed. 11 Or, accidentally destroyed; or, fraudulently destroyed, in his lifetime, by —, fully stating, as far as possible, all facts and circumstances of fraud connected with such destruction. See Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts. to Codes), § 1339. 12 Here state the provisions of the will, concerning the disposition of property, appointment of executor, and request, as for the appointment of a guardian for minor children, etc.

§ 1030. Restraining order in favor of claimants.

If, before or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, the court may restrain the administrators or executors, so appointed, from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will.—*Kerr's Cyc. Code Civ. Proc.*, § 1341.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 769.

Idaho*—Compiled Statutes of 1919, section 7472.

Montana*—Revised Codes of 1907, section 7417.

Nevada—Revised Laws of 1912, section 5882.

North Dakota—Compiled Laws of 1913, section 8643.

Oklahoma*—Revised Laws of 1910, section 6229.

South Dakota*—Compiled Laws of 1913, section 5690.

Washington—Laws of 1917, chapter 156, pages 648, 649, section 21.

Wyoming*—Compiled Statutes of 1910, section 5435.

PROBATE OF LOST OR DESTROYED WILL.

- | | |
|--|---|
| 1. Pleading destruction or loss. | 5. When presumption as to revocation is overcome. |
| 2. Character of evidence required. | 6. Burden of proof. |
| 3. Proof of execution and contents. | 7. New trial. |
| 4. Presumptions incident to loss or destruction. | 8. Appeal. |

PROBATE OF LOST OR DESTROYED WILL.

1. Pleading destruction or loss.—Upon a petition to establish an instrument as a lost will, it is necessary to aver, in the petition, that such instrument was in existence at the time of the death of the testator; but this rule is sufficiently complied with, where the petitioner alleged that "said deceased, at the time of his death, left a will which your petitioner alleges to be the last will and testament of said deceased." The expression, "left a will," is equivalent to saying that the will was in existence at that time.—*Harris v. Harris*, 10 Wash. 555, 39 Pac. 148. In a proceeding that alleges the fraudulent destruction of a will, the facts and circumstances constituting the fraud must be stated. Evidence showing mere neglect in preserving the will may not be sufficient to impute fraudulent conduct. If not sufficient, an order admitting the will to probate as a destroyed will, will be reversed.—*Estate of Kidder*, 66 Cal. 487, 6 Pac. 326.

2. Character of evidence required.—Lost wills are to be proved by evidence no less cogent and satisfactory than that required to establish the validity of such instruments when they are in the presence of the court, and subject to inspection and examination.—*Harris v. Harris*, 10 Wash. 555, 39 Pac. 148. Before admitting a lost or destroyed will to probate its contents must be shown by evidence clear and satisfactory.—*Barnes v. Brownlee*, 97 Kan. 517, 155 Pac. 962. Under the statute of the state of Washington providing that in proceedings for the establishment of lost or fraudulently destroyed wills the provisions of the will must be clearly and distinctly proved by at least two credible witnesses, each of such witnesses must be able to testify to the contents of the will from his own knowledge.—*In re Needham's Estate*, 70 Wash. 229, 126 Pac. 430. When the will of a testatrix attested by two witnesses was accidentally destroyed by fire in the San Francisco public calamity of April 8, 1906, without the knowledge or assent of the testatrix, it was not revoked thereby; nor is it essential to the probate of the will that all of its provisions must be distinctly proved by both witnesses, but independent portions of the will clearly identified by both of them must be admitted to probate under the amendment of 1907 to section 1339 of the Code of Civil Procedure of California, while as to other independent parts of the will as to which the witnesses have disagreed, there can be no probate, and an intestacy must be declared.—*Estate of Patterson*, 155 Cal. 626, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, 26 L. R. A. (N. S.) 654, 102 Pac. 941. Where a will destroyed in the great conflagration of San Francisco was admitted to probate under section 1339 of the Code of Civil Procedure of California, the necessary finding that the contents of the will were proved by two credible witnesses was unsupported, where the only credible witness was one who drew the will and knew its contents, and was qualified to prove them by parol, and the only other witness to its contents was that of one who had never seen or read the will, but had merely heard it or a copy of it read to her by the one who drew the will.—*Estate of Guinasso*, 13 Cal. App. 518, 110 Pac. 335. The California statute of 1907, chap. 100, p. 100, permitting a will to be proved where it was destroyed, in the testator's lifetime, by a public calamity, was held applicable to the will of a testator who died before its enactment.—*In re Patterson's Estate*, 155 Cal. 626, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, 26 L. R. A. (N. S.) 654, 102 Pac. 941. Any substantial provision of a destroyed will may be proved and admitted where complete and independent of the other provisions which can not be proved, and where the validity and operation of parts proved are unaffected by unproved ones.—*In re Patterson's Estate*, 155 Cal. 626, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, 26 L. R. A. (N. S.) 654, 102 Pac. 941. And this rule is not changed by section 1339 of Code of Civil Procedure of California, requiring the provisions of a destroyed will to be clearly proved by at least two credible witnesses.—*In re Patterson's Estate*, 155 Cal. 626, 132 Am.

St. Rep. 116, 18 Ann. Cas. 625, 26 L. R. A. (N. S.) 654, 102 Pac. 941. Under that section the testimony of one who had personal knowledge and of another who had merely heard him read the will or a copy thereof is insufficient.—In re Guinasso's Estate, 13 Cal. App. 518, 110 Pac. 325. The disposition of personalty held not distinctly proved by two witnesses where attesting witnesses disagreed as to whether money was given as part of the residue or as a specific legacy.—In re Patterson's Estate, 155 Cal. 626, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, 26 L. R. A. (N. S.) 654, 102 Pac. 941.

REFERENCES.

Evidence to establish lost or destroyed wills.—See note 38 L. R. A. 433-457. The subject of the probate of lost or destroyed wills is dealt with in a note to the case of the Estate of Patterson, 132 Am. St. Rep. 127. May the part of a lost or destroyed will which can be established be admitted to probate where there are other portions that can not be established.—See 26 L. R. A. (N. S.) 654.

3. Proof of execution and contents.—Under the Washington statute, it is provided that no will is proved as a lost will unless its provisions are clearly and distinctly proved by at least two credible witnesses. The statute is mandatory, and can not be disregarded by the courts. If there was but one witness who, according to the evidence, ever saw the will sought to be proved, the testimony is insufficient to meet the requirements of the law.—Harris v. Harris, 10 Wash. 255, 39 Pac. 148. A copy of a lost will, proved to be correct, would not take the place of a credible witness, to satisfy the requirements of a statute providing that no will shall be allowed to be proved as a lost will unless its provisions be established by at least two credible witnesses.—Harris v. Harris, 10 Wash. 555, 39 Pac. 148. Under the Colorado statutes, to make the proof necessary to allow the probate of a lost or destroyed will, witnesses must testify as to the contents, and the entire contents of the will, so that the instrument can be substantially reproduced in writing, and, when so reproduced, written at length in the order admitting it to probate.—Todd v. Rennich, 13 Colo. 546, 22 Pac. 898, 899. The testimony of witnesses, in an application for the probate of a lost will, is not to be disregarded merely because interested in the result. Other reasons for discrediting them must appear.—In re Miller's Will, 49 Or. 452, 124 Am. St. Rep. 1051, 14 Ann. Cas. 277, 90 Pac. 1002, 1003. See, also, Hull v. Littauer, 162 N. Y. 572, 57 N. E. 102.

REFERENCES.

Probate of lost or destroyed will.—See Kerr's Cal. Cyc. Code Civ. Proc., §§ 1338, 1339. Lost or destroyed wills including proceedings for their probate.—See note 110 Am. St. Rep. 445-477.

4. Presumptions incident to loss or destruction.—In a proceeding to establish in probate, a lost will, a legal presumption is raised that the will was destroyed by the testator with the intention of revoking

it, where it was last seen in his custody, and could not be found after his death, and the burden of proof is on the proponent to overcome this presumption.—In *re McCoy's Estate*, 49 Or. 579, 90 Pac. 1105, 1106. The presumption, however, is but a *prima facie* one, and may be overcome by circumstances or other proof to the contrary. For this purpose, declarations of the testator are competent evidence.—In *re Miller's Estate*, 49 Or. 452, 124 Am. St. Rep. 1051, 14 Ann. Cas. 277, 90 Pac. 1002; In *re McCoy's Estate*, 49 Or. 579, 90 Pac. 1105, 1106. Where it appears that a careful search was made among the papers and effects of the deceased, and neither the will nor the codicil once known to have been executed, and no other testamentary papers could be found, the presumption arises that the decedent destroyed the will and codicil with intent to revoke them. This presumption is so strong as to stand in the place of positive proof. The principle that the state of things once shown to exist will be presumed to continue, and that, therefore, the could should presume that, as in the case of a lost deed, the will remained in existence down to the death of the testator, does not apply.—In *re Colbert's Estate*, 31 Mont. 461, 78 Pac. 971, 973. If a will, known to have been in the custody of the testator, can not, after his death, be found, the legal presumption is that it was destroyed by him for the purpose of revocation. The inference is that the will destroyed or unaccounted for was executed prior to the one that was retained by the testator, and, after his death, was regularly presented for probate; and the burden lies upon the contestant to prove that the will not produced is, in fact, the last will and testament of the deceased.—In *re Bell's Estate*, 13 S. D. 475, 83 N. W. 566, 567.

5. When presumption as to revocation is overcome.—While the law presumes that a will proved to have been in existence, and not found at the time of the death of the testator, was destroyed by him with intention to revoke the same, this presumption of revocation is overcome and rebutted, where it appears that the testator, after the execution of the will, deposited it with a custodian, and did not thereafter have it in his possession, or have access to it.—*Harris v. Harris*, 10 Wash. 555, 39 Pac. 148. Where a will is destroyed or missing at the time of the testator's death the presumption is that it was revoked by him; but this presumption may be overcome by proof.—*Barnes v. Brownlee*, 97 Kan. 517, 155 Pac. 962.

6. Burden of proof.—In case of a lost will, proof of its existence, at the time of the death of the testator, must be made by the proponent.—*Estate of Johnson*, 152 Cal. 778, 93 Pac. 1015, 1017. While the burden of proving the existence of a lost will, at the time of the testator's death, rests primarily upon him who offers such a will for probate, affirmative testimony is not absolutely necessary to establish that fact, for, like other facts, it may be shown by circumstantial evidence.—*Harris v. Harris*, 10 Wash. 555, 39 Pac. 148. Under the Oregon code, a will must be in writing except when made by a soldier

or mariner in active service, but when in writing, secondary evidence is admissible to prove its contents. Like any other written instrument, when shown to have been lost, it may be established, on proof of such loss—the burden of which is on the proponent—and admitted to probate, unless shown to have been revoked.—*In re Miller's Will*, 49 Or. 452, 124 Am. St. Rep. 1051, 14 Ann. Cas. 277, 90 Pac. 1002, 1003.

7. *New trial*.—The rule is for courts to regard with suspicion motions for a new trial based upon newly discovered evidence, however the disposition of them is within the court's discretion; but if such a motion is overruled, in a proceeding to probate a destroyed will, the discretion will not be regarded as abused though the new witness will testify to having seen and memorized the will before its destruction.—*Estate of Emerson*, 170 Cal. 81, 148 Pac. 523.

8. *Appeal*.—Where the county court, in Oklahoma, denies a petition for the probate of an alleged lost will, the district court, upon appeal will hear the case *de novo* and consider it in the same manner as if it had lawfully originated in that court.—*In re Combs' Estate* (Okla.), 166 Pac. 1070.

CHAPTER VI.

PROBATE OF NUNCUPATIVE WILLS.

- § 1031. Petition must allege what.
- § 1032. Form. Petition for probate of nuncupative will.
- § 1033. Form. Opposition to probate of nuncupative will.
- § 1034. Additional requirements.
- § 1035. Contests and appointments.

. PROBATE OF NUNCUPATIVE AND OF NON-INTERVENTION WILLS.

- | | |
|-----------------------|----------------------------|
| 1. Nuncupative wills. | 2. Non-intervention wills. |
| (1) In general. | (1) Probate of. |
| (2) Appeal. | |

§ 1031. Petition must allege, what.

Nuncupative wills may at any time, within six months after the testamentary words are spoken by the decedent, be admitted to probate, on petition and notice as provided in article one, chapter two of this title. The petition, in addition to the jurisdictional facts, must allege that the testamentary words or the substance thereof were reduced to writing within thirty days after they were spoken, which writing must accompany the petition. —*Kerr's Cyc. Code Civ. Proc.*, § 1344. See §§ 876-879, ante.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona—Revised Statutes of 1913, paragraph 770.
- Idaho*—Compiled Statutes of 1919, section 7473.
- Montana*—Revised Codes of 1907, section 7418.
- North Dakota—Compiled Laws of 1913, sections 8631, 8634.
- Oklahoma*—Revised Laws of 1910, section 6230.
- South Dakota*—Compiled Laws of 1913, section 5691.
- Utah—Compiled Laws of 1907, section 3790.
- Wyoming*—Compiled Statutes of 1910, section 5436.

§ 1032. **Form. Petition for probate of nuncupative will.**

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

To the Honorable the — ² Court of the County ³ of —, State of —.

The petition of —, of the county ⁴ of —, state of —, respectfully shows:

That — died on or about the — day of —, 19—, at —;⁵

That said deceased at the time of his death was a resident of the county ⁶ of —, state of —, and left property in the county ⁷ of —, state of —;

That the value of the estate left by said deceased does not exceed in value the sum of one thousand dollars (\$1000);⁸

That petitioner is an heir at law ⁹ of the said —, deceased, and is interested in his estate;

That said deceased left a last will, to wit, a nuncupative will; that testamentary words were spoken by decedent on or about the — day of —, 19—; that said testamentary words ¹⁰ were reduced to writing within — (—)¹¹ days after they were spoken and on or about the — day of —, 19—; that said writing is herewith presented with this petition; that more than — (—)¹² days have elapsed since the said testator's death; and that — (—)¹³ months have not elapsed since said testamentary words were spoken by the said testator;

That said will was made while the said testator was in actual military service in the field,¹⁴ and while he was in expectation of immediate death from an injury received on the same day that said will was made, published, and declared;

That your petitioner is the person named in said will as executor thereof, and consents to act as such;¹⁵

That the names, ages, and residences of the devisees and legatees under said will are as follows, to wit,—

Names.	Approximate ages.	Residences.
_____	_____	_____
_____	_____	_____

That the next of kin of said testator, whom your petitioner is advised and believes, and therefore alleges to be, the heirs at law of said testator, and the names, ages, and residences of said heirs, as far as known to your petitioner, are as follows, to wit,—

Names.	Approximate ages.	Residences.
_____	_____	_____
_____	_____	_____

That at the time said will was made, the said testator was over the age of eighteen (18) years, was of sound and disposing mind, and was competent to make a will; and

That the process of this court directing the widow ¹⁶ of said deceased, the heirs, legatees, and other persons interested in said estate, to be called in to contest the probate of said will, if they think proper, has been duly issued and returned to this court.

Wherefore your petitioner prays that said will be admitted to probate, and that letters testamentary thereon be issued to your petitioner, the person named therein as executor as aforesaid.

_____, Petitioner.

_____, Attorney for Petitioner.¹⁷

Explanatory notes.—¹ Give file number. ² Title of court. ³ Or, City and County. ⁴ Or, city and county. ⁵ State place. ^{6, 7} Or, city and county. ⁸ Or as otherwise prescribed by statute. ⁹ Or legatee, or devisee, or other person interested in the estate. ¹⁰ Or, the substance of said testamentary words. ¹¹⁻¹³ As prescribed by statute. ¹⁴ Or, doing duty on shipboard at sea. Give brief statement of circumstances surrounding the testator's death. ¹⁵ Or, renounces his right to letters testamentary. ¹⁶ If any. As to execution, requisites, receiving proof, and granting probate of nuncupative wills. See §§ 876-879, ante.

§ 1033. Form. Opposition to probate of nuncupative will.

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

Now comes — and opposes the admission to probate

of the alleged nuncupative will of the above-named decedent now presented to this court, and in support of such opposition alleges:

That he is an heir at law ² of the said —, deceased, and interested in the estate left by him;

That, at the time of pronouncing said pretended will, the said —, deceased, did not bid the persons present, nor any or either of them, to bear witness that such was his will, or words to that effect;

That said pretended nuncupative will was not made while the alleged testator was in the actual military service in the field;

That no testamentary words were spoken by the said testator, and that no testamentary words ever made by him, if made at all, were reduced to writing within the time prescribed by law, or at any other time, or at all;

That said —, at the time of making said pretended will, was not in extremis;

That said — was not of sound and disposing mind at the time of pronouncing said pretended will; and

That said — at the time he is alleged to have pronounced said pretended will was under eighteen years of age.

Wherefore contestant prays that the said alleged nuncupative will be denied probate. —, Contestant.

—, Attorney for Contestant.³

Explanatory notes.—1 Give file number. 2 Or, devisee or legatee. 3 Give address. See §§ 876-879, ante.

§ 1034. Additional requirements.

The superior court must not receive or entertain a petition for the probate of a nuncupative will until the lapse of ten days from the death of the testator, nor must such petition at any time be acted on until the testamentary words are, or their substance is, reduced to writing and filed with the petition, nor until the surviving husband or wife (if any), and all other persons resident in the

state interested in the estate are notified as hereinbefore provided.—*Kerr's Cyc. Code Civ. Proc.*, § 1345.

Note.—See ante, §§ 876-879.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona—Revised Statutes of 1913, paragraph 771.

Idaho—Compiled Statutes of 1919, section 7474.

Montana*—Revised Codes of 1907, section 7419.

North Dakota—Compiled Laws of 1913, section 8631.

Oklahoma—Revised Laws of 1910, section 6231.

South Dakota—Compiled Laws of 1913, section 5692.

Utah—Compiled Laws of 1907, section 3790.

Wyoming*—Compiled Statutes of 1910, section 5437.

§ 1035. Contests and appointments.

Contests of the probate of nuncupative wills and appointments of executors and administrators of the estate devised thereby must be had, conducted, and made as hereinbefore provided in cases of the probate of written wills.—*Kerr's Cyc. Code Civ. Proc.*, § 1346.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 772.

Idaho*—Compiled Statutes of 1919, section 7475.

Montana*—Revised Codes of 1907, section 7420.

North Dakota—Compiled Laws of 1913, section 8631.

Oklahoma—Revised Laws of 1910, section 6232.

South Dakota—Compiled Laws of 1913, section 5693.

Washington—Laws of 1917, chapter 156, page 646, section 15.

Wyoming*—Compiled Statutes of 1910, section 5438.

PROBATE OF NUNCUPATIVE AND OF NON-INTERVENTION WILLS.

1. Nuncupative wills.

(1) In general.

(2) Appeal.

2. Non-intervention wills.

(1) Probate of.

1. Nuncupative wills.

(1) In general.—The term "last sickness," as contemplated by the law controlling the making of nuncupative wills, has no application to a case where the sick person, after making the oral will disposing of property, arises from bed, discharges his nurse, walks about, and lives for fifteen days.—*Brown v. State*, 87 Wash. 44, Ann. Cas. 1917D, 604, 151 Pac. 81. The statute of the state of Washington, setting forth the essential conditions of the making of a nuncupative will, requires not only that the testator shall intend to make a will, but that he shall

intend to make an oral will; so that, after a written will has been denied probate on account of defective attestation, persons present at its signing can not prove its contents, so as to have the same admitted to probate as a nuncupative will.—*Brown v. State*, 87 Wash. 44, Ann. Cas. 1917D, 604, 151 Pac. 81. A nuncupative will, in order to be valid, must be offered for probate within six months after being made.—*In re Brown's Estate*, 101 Wash. 314, 172 Pac. 247.

(2) *Appeal*.—Upon appeal from an order dismissing a petition to contest the probate of a nuncupative will, on the ground that the contest was not instituted within one year from the date of the probate of the will, the supreme court will not pass upon the validity of the alleged will.—*In re Sullivan's Estate*, 40 Wash. 202, 111 Am. St. Rep. 895, 82 Pac. 297, 299.

2. Non-intervention wills.

(1) *Probate of*.—There are two methods of probating wills in the state of Washington. One is where the executor executes a will, subject to the control of the court, until the estate has been settled and the property distributed. The other method is that provided by the code of that state, which reads: "In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided therein, and that letters testamentary or of administration shall not be required, and where it also appears to the court, by the inventory filed and other proof that the estate is fully solvent, which fact may be established by an order of the court on the coming in of the inventory, it shall not be necessary to take out letters testamentary or of administration, except to admit to probate such will, and to file a true inventory of all the property of such estate in the manner required by existing laws. And after the probate of such will and the filing of such inventory all such estates may be managed and settled without the intervention of the court, if the said last will and testament shall so provide."—*Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 256.

PART XVII.

COMMUNITY PROPERTY AND SEPARATE PROPERTY.

CHAPTER I.

COMMUNITY PROPERTY AND SEPARATE PROPERTY.

- § 1036. Separate property of the wife.
- § 1036.1 Liability of separate property of wife.
- § 1037. Separate property of the husband.
- § 1038. Community property. Conveyances to or by married women.
Time limit for bringing action.
- § 1038.1 Sale, conveyance, mortgage of community property where one spouse has been adjudged insane.
- § 1038.2 Same. Notice of application for order.
- § 1038.3 Validity of sale. Confirmation.
- § 1039. Filing inventory is notice of wife's title, etc.
- § 1040. Earnings of wife, when living separate, are separate property.
- § 1040.1 Management, control, and disposition of community personal property.
- § 1040.2 Management and control of community real property.

COMMUNITY PROPERTY AND SEPARATE PROPERTY.

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 - (13) Death. Descent.
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- 2. Separate property.
 - (1) In general.
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§ 1036. Separate property of the wife.

All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.—*Kerr's Cyc. Civ. Code*, § 162.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona—Revised Statutes of 1913, paragraph 3848.

Colorado—Mills's Statutes of 1912, section 4747.

Idaho—Compiled Statutes of 1919, section 4656.

Kansas—General Statutes of 1915, sections 6160, 6161.

Montana—Revised Codes of 1907, section 3700.

Nevada—Revised Laws of 1912, section 2155.

New Mexico*—Statutes of 1915, section 2758.

North Dakota—Compiled Laws of 1913, section 4410.

Oregon—Lord's Oregon Laws, section 7034.

South Dakota—Compiled Laws of 1913, section 2589.

Utah—Compiled Laws of 1907, section 1198.

Washington—Remington's 1915 Code, section 5916.

Wyoming—Compiled Statutes of 1910, sections 3908, 3909.

§ 1036.¹ Liability of separate property of wife.

The separate property of the wife is liable for her own debts contracted before or after her marriage, but is not liable for her husband's debts; provided, that the separate property of the wife is liable for the payment of debts contracted by the husband or wife for the necessities of life furnished to them or either of them while they are living together; provided, that the provisions of the foregoing proviso shall not apply to the separate property of the wife held by her at the time of her marriage or acquired by her by devise, succession, or gift, other than by gift from the husband after marriage.—*Kerr's Cyc. Civ. Code*, § 171.

§ 1037. Separate property of the husband.

All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or

descent, with the rents, issues, and profits thereof, is his separate property.—*Kerr's Cyc. Civ. Code*, § 163.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona—Revised Statutes of 1913, paragraph 3848.

Idaho—Compiled Statutes of 1919, section 4659.

New Mexico*—Statutes of 1915, section 2764.

North Dakota—Compiled Laws of 1913, section 4410.

Oregon—Lord's Oregon Laws, section 7034.

South Dakota—Compiled Laws of 1913, section 2593.

Washington—Remington's 1915 Code, section 5915.

§ 1038. Community property. Conveyances to and by married women. Time limit for bringing action.

All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property; but wherever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property.

CONVEYANCES.—And in case the conveyance is to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument, and the presumption in this section mentioned is conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration.

LIMITATIONS.—And in cases where married women have conveyed, or shall hereafter convey, real property which they acquired prior to May nineteenth, one thousand eight hundred eighty-nine, the husband, or their heirs or assigns, of such married women, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said

real property, as follows: As to conveyances heretofore made, from and after one year from the date of the taking effect of this act; and as to conveyances hereafter made, from and after one year from the filing for record in the recorder's office of such conveyances, respectively.—*Kerr's Cyc. Civ. Code*, § 164.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona—Revised Statutes of 1913, paragraph 3850.

Idaho—Compiled Statutes of 1919, section 4660.

Nevada—Revised Laws of 1912, section 2156.

Washington—Remington's 1915 Code, section 5917.

§ 1038.¹ Sale, conveyance, mortgage, or lease of community property where one spouse has been adjudged insane.

Where real property is held as community property, and either the husband or wife has been adjudged insane, the husband or wife not insane may petition the superior court of the county in which such community real property is situated for an order permitting the husband or wife, not insane, to sell and convey, mortgage or lease, such community real property to raise moneys to provide for the support and care either of the sane or insane spouse, or of their minor children, and also to raise moneys for the payment of the necessary taxes, interest and other charges incurred and required to be paid for the protection and preservation of the community estate. Such petition must be subscribed and sworn to by the applicant, setting forth the name and age of the insane husband or wife; a description of the premises constituting the community real property petitioned to be sold, mortgaged, or leased; the value of the same; the county in which it is situated; and such facts, in addition to the insanity of the husband or wife, relating to the circumstances and necessities of the applicant and his or her family as he or she may rely upon in support of the petition.—*Kerr's Cyc. Civ. Code*, § 172b.

§ 1038.* Same. Notice of application for order.

Notice of the application for such order must be given by publication of the same, in a newspaper published in the county in which such community real property is situated, if there is a newspaper published therein, once each week for three successive weeks, prior to the hearing of such application, and a copy of such notice must also be personally served upon the nearest relative of such insane husband or wife, resident in this state, at least three weeks prior to such application; and in case there is no such relative known to the applicant, a copy of such notice must be so served upon the public administrator of the county in which such community real property is situated; and in such case it is the duty of such public administrator to appear and represent the interests of such insane person. For all such services rendered by the public administrator he must be allowed a reasonable fee, to be fixed by the court, and the same must be taxed as costs against the person making application for the order herein provided for.—*Kerr's Cyc. Civ. Code*, § 172c.

§ 1038.* Validity of sale. Confirmation.

If it appears to the court that such husband or wife has been adjudged insane, the court may make an order permitting the husband or wife, not insane, to sell and convey, or mortgage or lease such community real property, and thereafter any sale, conveyance, mortgage or lease, made in pursuance of such order is as valid and effectual as if the property affected thereby was the absolute property of the person making such sale, conveyance, mortgage or lease. If a sale is ordered it must be reported to and confirmed by the court.—*Kerr's Cyc. Civ. Code*, § 172d.

§ 1039. Filing inventory is notice of wife's title, etc.

The filing of the inventory in the recorder's office is notice and prima facie evidence of the title of the wife.—*Kerr's Cyc. Civ. Code*, § 166.

§ 1040. Earnings of wife, when living separate, are separate property.

The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.—*Kerr's Cyc. Civ. Code*, § 169.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona—Revised Statutes of 1913, paragraph 3849.

Montana*—Revised Codes of 1907, section 3704.

Nevada*—Revised Laws of 1912, section 2168.

New Mexico*—Statutes of 1915, section 2760.

North Dakota—Compiled Laws of 1913, section 4410.

Oregon—Lord's Oregon Laws, section 7045.

South Dakota—Compiled Laws of 1913, section 2593.

Utah—Compiled Laws of 1907, section 1201.

Washington—Remington's 1915 Code, section 5920.

Wyoming—Compiled Statutes of 1910, section 3912.

§ 1040.¹ Management, control, and disposition of community personal property.

The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he can not make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.—*Kerr's Cyc. Civ. Code*, § 172.

§ 1040.² Management and control of community real property.

The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that the sole lease, contract, mortgage, or deed of the husband, holding the record title to community real property, to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate.—*Kerr's Cyc. Civ. Code*, § 172a.

COMMUNITY PROPERTY AND SEPARATE PROPERTY.**1. Community property.**

- (1) In general.
- (2) Derivation of system. Nature of wife's estate.
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- (4) What is not.
- (5) Presumption.
- (6) How to be determined.
- (7) Husband's declaration as to.
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- (9) Power of husband over, generally.
- (10) Same. Exception to rule of his control.
- (11) Same. Power to give away.
- (12) Same. Power to make will of.
- (13) Death. Descent.
- (14) If wife dies first. Effect of.
- (15) If husband dies first. Effect of.
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- (18) Action by wife to recover.
- (19) Title of husband.
- (20) Title in wife's name, effect of.
- (21) Title in joint names.
- (22) Change of character of.

(23) Joint property.

- (24) Community obligation and liability therefor.
- (25) Lien of judgment.
- (26) Administration of. In Washington.
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- (29) Same. Succession by children and others.
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- (1) In general.
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- (11) Trust in, by husband.
- (12) Loan or gift of, to husband.
- (13) Distribution.
- (14) Appeal.

1. Community property.

(1) *In general.*—All property acquired after marriage, and which was not acquired by gift, bequest, devise, or descent, is community property.—*Bollinger v. Wright*, 143 Cal. 292, 295, 76 Pac. 1108. Land paid for with community funds is community property, though the title to it was taken in the wife's name.—*Dean v. Parker*, 88 Cal. 283, 287, 26 Pac. 91. If it is bought in part with the proceeds of the sale of community property, and in part with the joint note and mortgage of both husband and wife, and the deed is taken in the name of both, the property becomes community property, notwithstanding a statute which provides that, in case of a conveyance to a married woman and her husband, the presumption is that the married woman takes the part so conveyed to her as a tenant in common, unless a different intention is expressed in the instrument. Such a statute at most only creates a presumption that the deceased wife took the part conveyed to her as a tenant in common with her husband. The presumption is not conclusive, and is not intended to control or overthrow direct evidence. If the evidence overthrows the presumption, and shows that the deceased wife did not take as a tenant in common, the entire interest conveyed by the deed to husband and wife jointly is community property.—*Bollinger v. Wright*, 143 Cal. 292, 295, 76 Pac. 1108. Under the statutes of the state of Idaho, all property acquired after marriage by either husband or wife, not defined as the separate property of the husband or wife, is community property.—*Kohuy v. Dunbar*, 21 Ida. 258, Ann. Cas. 1913D, 492, 39 L. R. A. (N. S.) 1107, 121 Pac. 544. Property may be held as community property notwithstanding there was no marital ceremony to make the man and woman concerned husband and wife; provided such persons lived together as man and wife and so declared themselves before the statute was passed.—*Wells v. Allen*, 38 Cal. App. 586, 177 Pac. 180. Real estate purchased with funds included in or derived from the community property is, on the death of the wife, to be regarded as community property, notwithstanding title thereto was taken in her maiden name.—*Wells v. Allen*, 38 Cal. App. 586, 177 Pac. 180; *Kohny v. Dunbar*, 21 Ida. 258, 263, Ann. Cas. 1913D, 492, 39 L. R. A. (N. S.) 1107, 121 Pac. 544. Except as otherwise specified in the statute, all property acquired after marriage by either the husband or the wife, or both, is "community property."—*In re Slocum's Estate*, *Knowles v. Slocum*, 83 Wash. 158, 145 Pac. 204. Under specific statutory provisions, all property acquired by either spouse, after marriage, excepting by gift, bequest, or descent, is community property, including the rents and profits of the separate property.—*Scott v. Scott* (Ida.), 247 Fed. 976, 977. Personal property acquired by the spouses during coverture, and not by gift, devise, or descent, although standing in the name of the wife, will be deemed to be community property, when it appears that the husband attended to all business and maintained to his death the absolute dominion and control of the property in all

its phases; that his wife was utterly ignorant of and unversed in business, and that the same was acquired with community property.—*Hammond v. McCollough*, 159 Cal. 639, 115 Pac. 216. If property is acquired by wife by purchase with community funds, or in exchange for other community property, it is not accumulated in the sense of the Civil Code of California, section 169, whereby property accumulated belongs to the wife's separate estate.—*Union Oil Co. v. Stewart*, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313. Everything in possession of either spouse during marriage is not merely presumed to be, but is, community property unless a better separate right can be satisfactorily shown. This is a rule of property law, not of evidence merely.—*Albright v. Albright*, 21 N. M. 606, Ann. Cas. 1918E. 542, 157 Pac. 662, 663. A man's second wife, taken by him in California, to which state he removed after the first wife's death, is entitled to no portion of his estate, as being community property, if it was accumulated before his removal.—*In re Boselly's Estate*, 178 Cal. 715, 175 Pac. 4.

(2) *Derivation of system. Nature of wife's estate.*—Our purpose, in this note, is merely to give a general idea of the law governing community property and separate property. The subject, in its details, is elaborately considered in the annotations to *Kerr's Cyc. Civ. Code of California*, and we can do no better than to refer to those annotations for information concerning all matters of substantive law on this topic. The system of community estate was derived from the Mexican law, which prevailed here before the acquisition of the territories. The system was unknown to the common law, and it has no better name for the interest of the wife than "a mere expectancy."—*Spreckels v. Spreckels*, 116 Cal. 339, 346, 58 Am. St. Rep. 170, 36 L. R. A. 497, 48 Pac. 228. The "estate in expectancy," of the wife in the community property, is dependent upon her survivorship.—*Estate of Rowland*, 74 Cal. 523, 525, 5 Am. St. Rep. 464, 16 Pac. 315. The legal title to the community property is in the husband. He has the absolute dominion over, and control of, it, and the wife has no right or title of any kind, in any specific property, but a possible interest in whatever remains, upon a dissolution of the community otherwise than by her own death. This can not be classified as any species of estate known to the law.—*Estate of Burdick*, 112 Cal. 387, 393, 44 Pac. 734. So long as the community exists, the wife's interest therein is a mere expectancy, and possesses none of the attributes of an estate, either at law or in equity. It is like the interest which an heir may possess in the property of his ancestor.—*Estate of Moffitt*, 153 Cal. 359, 20 L. R. A. (N. S.) 207, 95 Pac. 653, 654, 1025, 1026. The relation of husband and wife as to their property under the community system is somewhat in the nature of a partnership, there being usually partnership property and separate property of the copartners.—*Lynam v. Vorwerk*, 13 Cal. App. 507, 110 Pac. 355.

(3) What is.—Property acquired after marriage with community funds is community property.—*Fulkerson v. Stiles*, 156 Cal. 703, 105 Pac. 966; *Lynam v. Vorwerk*, 13 Cal. App. 501, 110 Pac. 355. A husband's right to sue for damages for personal injuries to his wife is a chose in action and is community property, of which he has the management and control.—*Labonte v. Davidson*, 31 Ida. 644, 175 Pac. 588. Right to recover damages for breach of contract to carry passenger safely to destination, when acquired by husband or wife, or both, after marriage, is community property.—Civil Code of California, section 164.—*Justis v. Atchison etc. R. Co.*, 12 Cal. App. 639, 108 Pac. 328. Damages recovered for injury to the wife is community property.—*Justis v. Atchison etc. R. Co.*, 12 Cal. App. 639, 108 Pac. 328. The earnings of a wife, while she is living with her husband, are community property, unless made otherwise by reason of some agreement to the contrary or of a gift by the husband.—*Ahlstrom v. Tage*, 31 Ida. 459, 174 Pac. 605. Where a promise has been made orally to an unmarried man to convey land to him, on his paying the price, and the conveyance is made after the man's marriage, the money paid being acquired by the joint efforts of his wife and him, the land becomes community property.—*In re Mason's Estate*, *Mason v. Mason*, 95 Wash. 564, 164 Pac. 205.

REFERENCES.

What is community property.—See note 126 Am. St. Rep. 99. Profits accruing during marriage in connection with property belonging to separate estate of either spouse as community property.—See note 31 L. R. A. (N. S.) 1092. What is community property.—See note 126 Am. St. Rep. 99, and notes *Kerr's Cyc. Civ. Code*, § 164.

(4) What is not.—An executory contract for the sale and purchase of land conveys no title, either legal or equitable; and, until its performance, creates no community rights.—*Converse v. La Barge*, 92 Wash. 282, 158 Pac. 958. Property acquired by gift, devise, bequest, or descent, is not community property.—*Union Oil Co. v. Stewart*, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313. Where a rooming house is the separate property of a married woman, all the profits from its management by her do not constitute community funds.—*Lenninger v. Lenninger*, 167 Cal. 297, 139 Pac. 679. If a woman, while in partnership with a man, appropriates partnership funds, the money thus appropriated will not, upon their subsequent marriage, be regarded as community property.—*Lenninger v. Lenninger*, 167 Cal. 297, 139 Pac. 679. The increase of livestock bought with the wife's separate property is not community property.—*Bank of Nez Perce v. Pindel*, *In re Pindel*, 193 Fed. 917, 923, 113 C. C. A. 545. If a man enters land under the homestead law, before his marriage, the fact that final proof is not submitted on his entry until after his marriage, nor that till then the final certificate is issued, does not make the land community property.—*Humbird Lumber Co. v. Doran*, 24 Ida. 507, 511, 135 Pac. 66. Where a husband purchased land while living apart from his wife and sold it as a single

man, and the wife was afterwards granted a divorce, she can not claim a half interest therein on the husband's death, the statutes of descents and distributions giving such interest only where the marriage subsists at the husband's death.—*Kessinger v. Schrader*, 79 Kan. 23, 98 Pac. 236. Even though, strictly speaking, there is no "community property" when there has not been a valid marriage, the courts will, in dividing gains made by the joint efforts of a man and woman living together under a voidable marriage which is subsequently annulled, apply, by analogy, the rules which would obtain with regard to community property where a valid marriage is terminated by death of the husband or by divorce. The apportionment of such property between the parties, not being provided by any statute, should be made on equitable principles, and the amount to be allotted to her is to be determined by the exercise of the sound discretion of the trial court.—*Coats v. Coats*, 160 Cal. 671, 36 L. R. A. (N. S.) 844, 118 Pac. 441.

(5) *Presumption*.—The presumption is that property acquired by husband or wife during the marriage is community property, but this presumption may be rebutted by proof.—*Carlson v. Rea*, 94 Wash. 218, 161 Pac. 1195. The presumption is that all property acquired during the existence of the marital relation is community property, and this presumption obtains when the legal title is in the name of the wife, as well as when it is in the name of the husband.—*Patterson v. Bowes*, 78 Wash. 476, 477, 139 Pac. 225. Under the community property laws of the state of Idaho whenever, after marriage, the husband purchases real estate in that state, a *prima facie* presumption arises that such property is community property, but such presumption may be overcome by the husband assuming the affirmative and burden of proof and showing as a matter of fact that such property was purchased with his separate estate.—*Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796. It is undoubtedly the rule that all property acquired by either spouse during the existence of the marriage is presumed to be community property, and that the burden of overcoming the presumption by clear and satisfactory evidence rests upon the party claiming that the property is separate.—*In re Niccoll's Estate*, 164 Cal. 368, 129 Pac. 278, 279. Property acquired by a husband during coverture is presumed to be community property, in the absence of a showing that it was acquired by gift, bequest, devise or descent, or was purchased with his separate property; but this presumption is rebuttable.—*Estate of Hill*, 167 Cal. 59, 138 Pac. 690. In general, property acquired during the existence of the community is presumed to be community property, though possessed and controlled by the husband.—*Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360. A lease acquired after marriage, by either spouse, is presumptively community property.—*Williams v. Bebee*, 79 Wash. 133, 134, 139 Pac. 867. An automobile, bought by the husband after marriage, is presumed to be community property, if there has been no divorce, and the burden is on him to prove that it is not.—*Marston v. Rue*, 92 Wash. 129, 159 Pac.

111. A disputable presumption, warranted by section 164 of the Civil Code of California, that a deed to a deceased wife created a separate estate in her, is overcome by positive testimony that the subject-matter was taken as community property, unless the rights of innocent purchasers intervened.—*Wells v. Allen*, 38 Cal. App. 586, 177 Pac. 180. It must be assumed, if evidence to the contrary is not produced, that the laws of sister states as to the status of property acquired by husband and wife, like those of California, make such property community.—*Estate of Hartenbower*, 176 Cal. 400, 168 Pac. 560. In the instant case the property in question was acquired during coverture and is presumed to be community property, and this presumption could be overcome only by establishing the affirmative plea that the property was held in trust for the person asserting the trust.—*Brucker v. DeHart*, 106 Wash. 386, 180 Pac. 397, 398. Any presumption that the property of a decedent was community in character is dispelled by positive and uncontradicted testimony that it was separate estate, and owned as such before his marriage.—*Estate of Bollinger*, 170 Cal. 380, 149 Pac. 995. By the operation of the statute, defining community property, if the husband, owing community debts, makes a transfer to the wife, even through an attempted corporation, she being the sole stockholder, she would be presumed to be trustee of the legal title for the community.—*Peterson v. Badger State Land Co.*, 86 Wash. 530, 150 Pac. 1187. Where land is conveyed to a married woman by an instrument in writing, the presumption is, under section 164 of the Civil Code of California, that the title vested in her as her separate property. Evidence, however, that the property was purchased and paid for out of community funds, that it was purchased for and used as the family home, without surrender of exclusive possession to the wife, that all business was transacted by the husband and none by the wife; that in the case of other lands, title to which stood in the name of the wife, the husband made the contracts for their sale and that the wife made a deed pursuant thereto; and that where promissory notes were taken in the name of the wife, the moneys for which the notes were given were paid over by the husband out of the community funds, and when payments were made on the notes they were made to the husband and receipted for by him, is sufficient to sustain a finding that the land was community property.—*Hammond v. McCollough*, 159 Cal. 639, 115 Pac. 216.

(6) How to be determined.—Whether the property acquired during marriage is separate or community property depends upon whether it was acquired by separate or community funds and credit, or the issues and profits of either.—*Carlson v. Rea*, 94 Wash. 218, 161 Pac. 1195. The nature of the property as to whether or not it is community property is to be determined from the nature of the transaction without reference to who retains the title.—*Osborn v. Mills*, 20 Cal. App. 343, 128 Pac. 1009. In determining whether the property acquired by a husband was separate or community, regard should be

had to his equitable status as purchaser, not simply to the technical mode by which the legal title came to be vested in him.—*Estate of Hill*, 167 Cal. 59, 138 Pac. 690. Community estate may be vested in either spouse, and whether property so vested is community or separate is to be determined from nature of transaction in which it was acquired. Any evidence is admissible to overcome presumption pronounced by section 164 of the Civil Code of California, amended by Stats. 1889, p. 328.—*Killian v. Killian*, 10 Cal. App. 312, 101 Pac. 806.

(7) *Husband's declaration as to.*—In the administration of the estate of a testatrix of a will mutual in form executed by her and her husband, a declaration in the will that everything owned by them was community property is not binding on the court, but that question is to be determined by the court in accordance with the mode whereby the property was acquired.—*Estate of Learned*, 156 Cal. 309, 104 Pac. 315. In an action by the personal representative of a deceased husband, against his wife's estate, to quiet title to land which stood in the name of the wife, on the ground that it was community property, declarations of the husband, to the effect that it was unnecessary that he should make a will, that his wife had everything, and that he had given or had left everything to her, are but expressions of his belief as to what he had done or accomplished, and are not controlling in determining what in fact he had or had not done or accomplished.—*Hammond v. McCollough*, 159 Cal. 639, 115 Pac. 216.

(8) *Interest of each spouse in.*—The law makes no distinction between husband and wife as to the degree, quantity, nature or extent of the interest each is to have in community property.—*Ewald v. Hufton*, 31 Ida. 373, 173 Pac. 247. Under the community property law of the state of Idaho the wife has an equal interest and ownership with the husband in community property and the only particular in which their rights differ is in the fact that the statute constitutes the husband the managing and sales agent and trustee of the community partnership and authorizes him to sell and pass title to such property and exercise absolute control over the same.—*Kohny v. Dunbar*, 21 Ida. 258, Ann. Cas. 1913D, 492, 39 L. R. A. (N. S.) 1107, 121 Pac. 544. The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community where both are equal, and that property acquired during marriage by community funds or the labor and industry of either spouse, is the community property of the husband and wife and the presumption in all doubtful cases is strongly in favor of treating that which either spouse may own as community property. It is true that during the coverture the personal property belonging to the community may be disposed of by the husband only, but it is equally true that no sale or incumbrance of the real estate may be made by the husband without the consent of the wife.—*La Tourette v. La Tourette*,

15 Ariz. 200, Ann. Cas. 1915B, 70, 137 Pac. 428. In community property, the husband and wife have an equal interest and ownership, except that he is the managing and sales agent and trustee of the community partnership, and is authorized to sell and pass title to such property, and may exercise absolute control over it.—*Kohny v. Dunbar*, 21 Ida. 258, 264, Ann. Cas. 1913D, 492, 39 L. R. A. (N. S.) 1107, 121 Pac. 544. The interest of either husband or wife in the community property is liable for the community debts, and it follows that a husband leaves the wife's interest free therefrom, so far as other legatees are concerned, by directing in his will that as soon as the executors "have sufficient funds in their hands belonging to my estate" they shall pay all just debts properly charged against "my estate."—*Redelsheimer v. Zepin*, 105 Wash. 199, 177 Pac. 736. Where a note is the separate property of the wife, at the time of its execution, and not by assignment from her husband, the latter is not incompetent as a witness in her behalf under section 1880, subd. 3, Code of Civil Procedure.—*Cullen v. Bisbee*, 168 Cal. 695, 698, 144 Pac. 968. Property accumulated by the exertions of the husband while the wife attends to the household and cares for the children is subject to title in the wife no more than if it had been bought with proceeds derived from his separate estate.—*Anderson v. Cercone* (Utah), 180 Pac. 586.

REFERENCES.

Community property, various phases of the law of.—5 R. C. L. 823-867; title, Community Property.

(9) Power of husband over, generally.—Ownership of community property is placed in husband by law.—*Fulkerson v. Stiles*, 156 Cal. 703, 105 Pac. 966. Under the provisions of section 2686, Revised Codes of Idaho, the husband has the management and control of the community property with the like absolute power of disposition as he has of his separate property.—*Kohny v. Dunbar*, 21 Ida. 258, Ann. Cas. 1913D, 492, 39 L. R. A. (N. S.) 1107, 121 Pac. 544. The husband can neither beggar his family nor use the community personal property to gratify a caprice to thwart the law, or for his own personal aggrandizement.—*Stewart v. Bank of Endicott*, 82 Wash. 106, 143 Pac. 458. A husband can not convey or in any manner incumber community property, occupied by him and his wife as a community homestead, unless the wife joins in the instrument of conveyance or incumbrance.—*Hughes v. Latour Creek R. Co.*, 30 Ida. 475, 166 Pac. 219. A devise by a wife, to her husband, of her one undivided half of the community property, the husband to hold until he dies or remarries, and her two sons to take upon the happening of either event, makes the husband trustee of any funds traceable to the community property, the beneficiaries being himself as to one-half and the two sons as to the other.—*Paysse v. Paysse*, 86 Wash. 349, 150 Pac. 622. The earnings of the wife during marriage and while living with her husband, as community property, are subject to the control of the husband; but the husband

may relinquish to the wife his interest in her earnings, and when he does so, such earnings become the separate property of the wife.—*Larson v. Larson*, 15 Cal. App. 531, 115 Pac. 340. Dispositions not in fraud of the rights of the wife by the husband are valid.—*Jacobs v. All Persons Interested, etc.*, 12 Cal. App. 163, 106 Pac. 896. A husband is bound to support his insane wife out of the community property, but not to hand over the management of it to her guardian.—*Merriam v. Patrick*, 103 Wash. 442, 174 Pac. 641. The husband is at least a necessary party to an action for community property, and a defense against him is a defense to the action.—*California Code Civ. Proc.*, section 870.—*MacLeod v. Moran*, 11 Cal. App. 622, 105 Pac. 932. Since a wife is in the care of her husband, his negligence is imputable to her.—*Basler v. Sacramento Gas & Elec. Co.*, 158 Cal. 514, Ann. Cas. 1912A, 642, 111 Pac. 530.

REFERENCES.

Management, control, and disposition of community property.—See notes *Kerr's Cyc. Civ. Code*, § 172. Liability of community property for debts before estate descends to heirs.—See note 19 *L. R. A.* 234. That heirs or personal representatives may sue for the death of one, not a minor caused by the wrongful act of another.—See *Kerr's Cyc. Code Civ. Proc.*, § 377; but the husband's right of action for an injury to his wife, resulting in death, is not community property, when.—See *Redfield v. Oakland Con. St. Ry. Co.*, 110 Cal. 277, 289, 290, 42 Pac. 822. In a jurisdiction where an estate by entireties may be taken, the wife, after her husband's death, becomes the sole owner of real property conveyed by deed to him and her during coverture.—See *McLaughlin v. Rice*, 185 Mass. 212, 102 Am. St. Rep. 339, 70 N. E. 52; but as to the effect of a deed to husband and wife, where the community property system prevails, see notes *Kerr's Cyc. Civ. Code*, § 164, pars. 36-75.

(10) Same. Exception to rule of his control.—An exception to the rule that the husband has control of community property is that the wife is a necessary party to an action for injuries to her.—*Basler v. Sacramento G. & E. Co.*, 158 Cal. 514, Ann. Cas. 1912A, 642, 111 Pac. 530. A right of action for false imprisonment of the wife is community property, but the wife is a necessary party.—*Gomez v. Scanlan*, 155 Cal. 528, 102 Pac. 12. A wife can not elect the form of action in which damages for an injury shall be recovered.—*Justis v. Atchison etc. R. Co.*, 12 Cal. App. 639, 108 Pac. 328. A wife can not alone execute a release or satisfaction of a right of action for injuries sustained because of the violation of a contract to carry her safely.—*Justis v. Atchison etc. R. Co.*, 12 Cal. App. 639, 108 Pac. 328. Evidence that a husband could have given an alarm and prevented a collision of cars which took place while his wife was dismounting was held insufficient to show contributory negligence imputable to the wife.—*Basler v. Sacramento G. & E. Co.*, 158 Cal. 514, Ann. Cas. 1912A, 642, 111 Pac. 530. Where a complaint discloses the relation of husband

and wife, wherefore the husband is a necessary party, objection must be taken by demurrer.—Cal. Code Civ. Proc., section 430.—*MacLeod v. Moran*, 11 Cal. App. 622, 105 Pac. 932. Where a husband's negligence contributes proximately to his wife's injuries, recovery will not be permitted, since the husband can not benefit by his own wrong, and recovery is community property.—*Basler v. Sacramento G. & E. Co.*, 158 Cal. 514, Ann. Cas. 1912A, 642, 111 Pac. 530. On the principle that a claim for damages for personal injuries received by the wife is community personal property of the married pair, the fact, that under the law the husband, while they are living as such, is vested with the management and control of the community property and may deal with it as if it were his separate property, would make the husband the only necessary party plaintiff in an action to enforce such a claim.—*Hammond v. Jackson*, 89 Wash. 510, 154 Pac. 1106. In action for damages for injury to wife, the husband is a necessary party plaintiff.—*Basley v. Sacramento G. & E. Co.*, 158 Cal. 514, Ann. Cas. 1912A, 642, 111 Pac. 530; *Justis v. Atchison, etc.*, R. Co., 12 Cal. App. 639, 108 Pac. 328.

(11) Same. Power to give away.—Community property may be the subject of a gift from husband to wife.—*Killian v. Killian*, 10 Cal. App. 312, 101 Pac. 806. A complaint by a surviving husband for community real estate standing in name of his deceased wife, alleging that she took title for the benefit of the community, was held to negative any presumption of gift and to render evidence controverting such prima facie fact admissible.—*Killian v. Killian*, 10 Cal. App. 312, 101 Pac. 806. Under such allegations, the court must find on the issue of gift.—*Killian v. Killian*, 10 Cal. App. 312, 101 Pac. 806. Prior to amendment of section 172 of the Civil Code of California, by Stats. 1891, chap. 220, providing that the husband can not make a gift of community property nor transfer the same without his wife's consent, the husband could convey community property without his wife's written consent; the amendment was not retroactive and did not deprive him of his power to dispose of, without his wife's consent, community property acquired prior to such date.—*Clavo v. Clavo*, 10 Cal. App. 447, 102 Pac. 556. To constitute a valid gift of community property from the husband to the wife, the delivery of the deed must be made with the intention of making a gift and passing title, a mere delivery of property without such intent passing no title.—*In re Carlin*, 19 Cal. App. 168, 124 Pac. 868. A husband may, in good faith, make a gift of land owned by him in the state of Kansas, of which his wife has made no conveyance, without defrauding her, if she has never resided in that state, but to make the gift effective to bar her statutory right accruing after his death, he must consummate it by a conveyance, and the grantee must not be guilty of actual fraud in obtaining it.—*McKelvey v. McKelvey*, 79 Kan. 82, 99 Pac. 238. The policy of permitting the presumption arising from a conveyance of real estate purchased with community funds to a married woman to be overthrown after

the wife's death by evidence of an undisclosed intent on the part of the husband that it was not the subject of a gift, may well be questioned. It is the province of the legislature, however, and not of the courts, to determine questions of policy.—*In re Carlin*, 19 Cal. App. 168, 124 Pac. 868. When property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property under section 164 of the Civil Code of California, but this is a mere rule of evidence fixing the onus probandi in cases where the question of ownership is in litigation. Neither the wife nor her representative is bound to prove that the conveyance was a gift; but it devolves upon the husband to overcome the presumption by showing that it was not a gift. It is held that such burden was sufficiently sustained by the evidence of the husband that it was the intention to provide a home for both and not to give her the property, which, in the absence of any inconsistent testimony, is sufficient to support the conclusion of the trial court.—*In re Carlin*, 19 Cal. App. 168, 124 Pac. 868. A gift of community property by the husband without the wife's concurrence can be questioned only after his death, at which time it is voidable by her, but voidable only as to one-half its value; however, she is entitled to one-half without regard to the condition of the husband's estate at his death.—*Dargie v. Patterson*, 176 Cal. 714, 169 Pac. 360. Although a statute prohibits a husband from giving away community property without the consent of his wife, in writing, such statute is not retroactive, and does not deprive him of his vested right to dispose, by gift, of the community property that he had acquired prior to the enactment of such statute.—*Spreckels v. Spreckels*, 116 Cal. 339, 341, 58 Am. St. Rep. 170, 36 L. R. A. 497, 48 Pac. 228.

(12) *Same. Power to make will of.*—While the husband has the management and control of community personal property, he is forbidden to dispose of more than one-half of it by will.—*Stewart v. Bank of Endicott*, 82 Wash. 106, 143 Pac. 458. It is expressly provided by the statute that the husband shall have the management and control of the community property; but the rights of his surviving widow in the community property can not be jeopardized by his devise in subjecting such property to the control of trustees for the use of other persons.—*Estate of Burdick*, 112 Cal. 387, 40 Pac. 35, 37. A husband can dispose by will of only one undivided half of the community property; his wife is entitled to the other half.—*Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125; *Payne v. Payne*, 18 Cal. 291, 301; *Morrison v. Bowman*, 29 Cal. 337; *Estate of Silvey*, 42 Cal. 210; *Estate of Frey*, 52 Cal. 658, 661. A purpose of attempting a disposition, by will, of property, which, by statute, would pass to the wife, as survivor of a matrimonial community, immediately upon the husband's death, is not to be readily inferred.—*Estate of Silvey*, 42 Cal. 210, 213. A husband has a right to dispose of his own half of the community property, but where he attempts also to dispose, by will, of his wife's interest therein, and the

proofs do not show that the wife knowingly performed any act indicating, or which could be construed to be, a waiver of her right under the will, the devise of the community property must be read as applying only to the estate within his power of testamentary disposition, namely, to his one-half.—*King v. Lagrange*, 50 Cal. 328, 333. Where it was evidently the intention of a deceased husband to dispose of the entire community property as his own, to the exclusion of any claim therein of his wife, she must elect between the provisions of the will and her right as surviving spouse to one-half of the community property. If she accepts the devises and bequests provided for her by the will, it confirms the disposition made by the husband of the common property.—*Estate of Stewart*, 74 Cal. 98, 104, 15 Pac. 445. If a husband devises the whole of the community property, his wife is entitled to the half which goes to her by law, and, if she takes the other half as devisee under the will, she is thus possessed of the entire estate.—*Payne v. Payne*, 18 Cal. 291, 302. In Washington, if a wife dies, a creditor has a right to levy on, sell, and buy the surviving husband's interest in the community real property standing in the husband's name.—*Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765, 766.

(13) **Death. Descent.**—If husband and wife have no lineal descendants the community property goes to the survivor, and it and the profits from it are enjoyed by him or her until death, at which time it, without regard to whether it has or has not changed in form, is divided so that his portion goes to his relatives and her portion to hers, unless it has become so commingled with the separate estate of such survivor as to be impossible of identification.—*Estate of Brady*, 171 Cal. 1, 151 Pac. 275. It is within the power of the legislature to place the whole of the community estate in the survivor, or in the "legitimate issue," if any, of the deceased spouse.—*Wasmund v. Wasmund*, 90 Wash. 274, 156 Pac. 3. Under the Idaho statute prevailing September 16, 1909, in case of the death of the husband or wife intestate, his or her share of the community property, not an interest therein, descended equally to the legitimate issue of his, her, or their bodies, without regard to whether the property stood in the name of the decedent or the other party to the marriage.—*Ewald v. Hufton*, 31 Ida. 373, 173 Pac. 247. Upon the dissolution of the community by the death of the husband or wife, intestate, the survivor became tenant in common with the decedent's heirs in respect to the community property as of the time of the death, if that took place prior to the amendment, of 1915, to the community property law of Idaho.—*Ewald v. Hufton*, 31 Ida. 373, 173 Pac. 247. A mortgage executed by the survivor of two parties, husband and wife, where the other died on the 16th day of September, 1909, intestate and leaving issue, was a nullity, so far as it purported to cover the interests of the children, and did not create any lien thereon.—*Ewald v. Hufton*, 31 Ida. 373, 173 Pac. 247. If a wife dies, leaving a child to inherit her part of the community property, the interests of such child can not be charged with the expenses incident to the support of the

family of the husband, incurred subsequently to the dissolution of the community, even to the extent that such expenses have been increased by the child's membership in the family.—*In re Mason's Estate*, *Mason v. Mason*, 95 Wash. 564, 164 Pac. 205. Where a husband, to whom the wife has left the community property for his life, or until he remarries, purchases land with community funds, takes another wife, conveys the land to her without consideration, and then dies, this wife has in this land only such interest as the husband had beneficially, the remaining interest going to the persons who, under the first wife's will, were to take on the determination of the husband's estate.—*Paysse v. Paysse*, 86 Wash. 349, 150 Pac. 622.

(14) *If wife dies first. Effect of.*—If a wife dies, no administration at all is to be had on any but her separate property.—*Estate of Young*, 123 Cal. 337, 347, 55 Pac. 1011. Upon the death of the wife, the community property belongs to the surviving husband, without administration.—*Dean v. Parker*, 88 Cal. 283, 287, 26 Pac. 91; *Johnston v. San Francisco Sav. Union*, 75 Cal. 134, 142, 7 Am. St. Rep. 129, 16 Pac. 753. See *Bollinger v. Wright*, 143 Cal. 292, 297, 76 Pac. 1108; and notes *Kerr's Cyc. Civ. Code*, § 1401. The husband, upon the death of his wife, holds the community property as if his wife had never existed.—*Estate of Rowland*, 74 Cal. 523, 526, 5 Am. St. Rep. 464, 16 Pac. 315. Under the provisions of section 5713, Revised Codes of Idaho, on the death of the wife one-half of the community property goes to the husband, subject to the community debts, and the other half is subject to the testamentary disposition of the deceased wife.—*Kohny v. Dunbar*, 21 Ida. 258, Ann. Cas. 1913D, 492, 39 L. R. A. (N. S.) 1107, 121 Pac. 544. Upon the death of a wife intestate, community property passes one-half to the husband and one-half to the legitimate issue of her body, the husband's interest becoming his separate property.—*Duvall v. Healy Lumber Co.*, 57 Wash. 446, 107 Pac. 358. Under section 1401 of the Civil Code of California, providing that upon the death of the wife the entire community property, without administration, belongs to the surviving husband, the husband does not take such property upon the death of the wife by succession, but he holds it all from the moment of her death as though acquired by himself.—*Estate of Klumpke*, 167 Cal. 415, 139 Pac. 1062. Under statutes providing that all the common property belonging to husband and wife shall go, in case of the death of one of the spouses, one-half to the survivor and the other half to the child or children of the union, and further providing that community property shall be liable for community debts, title to the community property, upon the death of the wife, vests immediately and absolutely in the surviving husband and in his child or children, the one taking title by virtue of survivorship, the other as an heir, but both referable to the statute; in such a case, there is no right to administer the community property where no community debts appear, as administration would be a useless thing.—*In re Wilson's Estate*, *Escalada v. Wilson*, 19 Ariz. 205, 168 Pac. 503. Where a married woman died, and there was no

administration of her estate, and her husband married again and then died, a debt of such woman of twenty years standing can not be enforced against her one-half of the community property, duly claimed by her son in the capacity of her heir, nor can such son's interests be charged with the expenses incurred in the support of his father's family after his mother's death.—*In re Mason's Estate*, *Mason v. Mason*, 95 Wash. 564, 164 Pac. 205.

REFERENCES.

Community property, how affected by death of wife.—See ante, § 32.

(15) *If husband dies first. Effect of.*—The husband has the sole management and control of the community property, in his lifetime, and alone can render that property chargeable with debts. Upon his death, the entire community property, as well as his separate property, is subject to the control of the court for the purposes of administration of his estate, and is taken into the possession and management of his administrator for these purposes, and, at the close of the administration, the wife receives at the hand of the court, in the same manner and at the same time as does the heir, her part of the community property,—the one-half of the surplus after paying the debts and expenses of administration.—*Estate of Burdick*, 112 Cal. 387, 400, 44 Pac. 734; *Estate of Young*, 123 Cal. 337, 346, 55 Pac. 1011. In Nevada, it was held under the statute of 1881, that upon the death of a husband, the entire community property became his widow's property without administration, although it was subject to all the debts contracted by the husband during his lifetime, and which were not barred by the statute of limitations, if she paid all indebtedness legally due from the estate, or secured the payment of the same to the satisfaction of the creditors.—*Wright v. Smith*, 19 Nev. 143, 7 Pac. 365, 366, 367. Under the provisions of section 5713, Revised Codes of Idaho, on the death of the husband, one-half of the community property goes to the wife, subject to the community debts, and the other half is subject to the testamentary disposition of the deceased husband.—*Kohny v. Dunbar*, 21 Ida. 258, Ann. Cas. 1913D, 492, 39 L. R. A. (N. S.) 1107, 121 Pac. 544. The fact that the statute uses the words "goes to," in referring to the possession by the wife of her one-half of the community property on the husband's death, does not mean that she takes merely by way of succeeding to the property.—*In re Williams*, 40 Nev. 241, 257, L. R. A. 1917C, 602, 161 Pac. 741. If a married man, one-third of whose property is separate estate, dies leaving his wife, by will, a life estate in all his property and the wife dies shortly afterwards, the expense of her maintenance is to be deducted from the whole estate, including her part of the community.—*In re Slocum's Estate*, 96 Wash. 110, 164 Pac. 759. The testimony of a second wife, petitioning for part of the deceased husband's estate as being community property, is not necessarily hearsay because declared by her to be the result of conversations with the deceased, if there is in the court's hands a deposition of hers of a former date

having a different tendency.—In *re Boselly's Estate*, 178 Cal. 715, 175 Pac. 4.

REFERENCES.

Community property, how affected by death of husband.—See ante, § 33. Distribution of common property on the death of the husband.—See notes *Kerr's Cyc. Civ. Code*, § 1402.

(16) *Rights of wife in.*—The wife's right in community personalty is such that, if her husband is absent and the property is in prospect of deterioration, she may, in the exercise of prudence, sell the property as she would her separate property.—*Marston v. Rue*, 92 Wash. 129, 159 Pac. 111. An acquittance, by the wife to the husband, which recites, as its subject, the one-half interest as hitherto held "in trust" for her, the pair having had a sort of business partnership in mining property acquired by "joint efforts," is no evidence of a relinquishment by the wife of her entire community interest.—*Marston v. Rue*, 92 Wash. 129, 159 Pac. 111. Under a contract for a deed, to be delivered upon completion of payment of the consideration in monthly installments, the contract providing for forfeiture in case of default in any payment, such community rights as are acquired by the wife of the purchaser, by reason of the transaction, become forfeited by non-compliance with the contract by the husband and the subsequent declaration of forfeiture and re-entry by the vendor.—*Converse v. La Barge*, 92 Wash. 282, 158 Pac. 958.

(17) *Deed from wife to husband.*—Subsequent to the execution of a deed of property to a wife, she, in pursuance of the directions of her husband, took a deed to the property drawn by him, from herself as grantor, to him, as grantee, and acknowledged it before a notary, by whom she was instructed that in order to vest title in her husband it would be necessary for her to deliver the deed to him, but that it was not necessary to have it recorded. The notary further instructed her that if so delivered and not recorded, and her husband died first, she could destroy the deed and the record title would stand in her name. She gave the deed to her husband, who informed her that she had correctly obeyed his instructions. He retained possession of the deed, did not place it of record, and upon his death it was destroyed by his wife. Held, that the evidence was sufficient to show a delivery of the deed by the wife, with intent to divest herself of her dominion and control over the property beyond power of recall, and to immediately vest her husband with title to it.—*Hammond v. McCollough*, 159 Cal. 639, 115 Pac. 216. It is held, upon a review of the evidence, that a purported bill of sale of such personal property from the husband to his wife was never delivered to her.—*Hammond v. McCollough*, 159 Cal. 639, 115 Pac. 216.

(18) *Action by wife to recover.*—The allegation of a married woman, in her complaint for a divorce, that certain personalty is community property, does not estop her from asserting that it is separate property

In a subsequent action by her to recover it from one who purchased it from her husband after the commencement of the divorce, the purchaser not having knowledge of the pendency of the divorce proceedings.—*Coolidge v. Austin*, 22 Cal. App. 334, 134 Pac. 357. In such case it is for the trial court to determine which of her conflicting statements is true.—*Coolidge v. Austin*, 22 Cal. App. 334, 134 Pac. 357. Proof that the wife left the property in the possession of the husband upon separating from him, unaccompanied by other indicia of ownership, does not establish an estoppel against her in favor of the purchaser.—*Coolidge v. Austin*, 22 Cal. App. 334, 134 Pac. 357. The judgment in the action annulling the marriage, in which no property rights of the parties were in issue or determined, does not estop the former wife from subsequently maintaining an action to recover an appropriate portion of the property accumulated by them during the existence of the marriage.—*Coats v. Coats*, 160 Cal. 671, 36 L. R. A. (N. S.) 844, 118 Pac. 441. In such action, a finding that the question of property rights was not presented by the pleadings in the annulment suit, and that no disposition of property was made or attempted to be made by the judgment in that suit, is conclusive on appeal.—*Coats v. Coats*, 160 Cal. 671, 36 L. R. A. (N. S.) 844, 118 Pac. 441. In an action by the woman, after the annulment of the marriage, to recover her portion of the property accumulated by the parties while the marriage was in existence, the court will not attempt to adjust their respective rights in proportion to the amount each contributed thereto.—*Coats v. Coats*, 160 Cal. 671, 36 L. R. A. (N. S.) 844, 118 Pac. 441.

(19) **Title of husband.**—The title to the community property is in the husband; during the existence of the community, the wife's interest in the community property is a mere expectancy; the husband's rights are active and the wife's rights are passive.—*Hall v. Johns*, 17 Ida. 224, 228, 105 Pac. 71. If the property was community property, the legal title remains in the husband, notwithstanding the fact that the deed was taken in the name of the wife. The whole title, both real and equitable, at once vests in the husband by means of the deed to the wife.—*Osborn v. Mills*, 20 Cal. App. 343, 128 Pac. 1009.

(20) **Title in wife's name, effect of.**—Where property has been purchased with community funds and title taken in the name of the wife, a third person to whom the husband has attempted to make a conveyance of the property in question can not, on the theory that he is the equitable owner by virtue of his deed, compel the wife to execute a conveyance to him while he has never offered to pay any substantial part of the purchase price and has in fact only paid a small portion thereof.—*Nolan v. Hyatt*, 163 Cal. 1, 124 Pac. 439. The failure of a husband to take title to community property in name of his wife in accordance with his promise to do so is not a fraud on the wife unless done with fraudulent intent.—*Clavo v. Clavo*, 10 Cal. App. 447, 102 Pac. 556. The right of the husband to maintain an action to recover real property, where the real property involved belongs to the

community, although conveyance thereof has been made to the wife and no purchaser has acquired title thereof in good faith and for value, has been recognized by the supreme court of this state in a number of instances.—*Osborn v. Mills*, 20 Cal. App. 343, 128 Pac. 1009. Where a wife has been adjudged trustee of certain property for the benefit of the marital community, she has sufficient interest in the property standing in her name to warrant her in opposing the claim that a third person has become the owner in equity and that she be required to convey the legal title to him.—*Nolan v. Hyatt*, 163 Cal. 1, 124 Pac. 439. The plaintiff, notwithstanding the execution of the deed by the husband, could not become the equitable owner of the community property standing in the name of the wife, without the payment or tender of some substantial consideration therefor, and the wife, in the absence of anything in the record of the former action estopping her from showing that the plaintiff had not become such equitable owner, could show such want of consideration in opposition to his claim of equitable ownership.—*Nolan v. Hyatt*, 163 Cal. 1, 124 Pac. 439. In this action by a husband against the devisees of his deceased wife to quiet title to real property purchased in her name, the findings that the property was community property and purchased and paid for by money belonging jointly to the plaintiff and his deceased wife, are supported by the evidence.—*Eaton v. Locey*, 22 Cal. App. 762, 136 Pac. 534. The testimony of the plaintiff was sufficient to overcome the presumption that the title to the property was vested in the wife as her separate property, or that he intended that the conveyance should operate as a gift to her.—*Eaton v. Locey*, 22 Cal. App. 762, 136 Pac. 534. It is improper to permit the husband in such an action to testify that the funds from which the property was purchased was not the "separate property" of the wife, but such testimony is not prejudicial where the witness also testifies that the purchase money was earned by them during their coverture.—*Eaton v. Locey*, 22 Cal. App. 762, 136 Pac. 534. Evidence that the wife executed deeds to the disputed property, and that she was the only party thereto is inadmissible, where the same were not executed in his presence or with his knowledge.—*Eaton v. Locey*, 22 Cal. App. 762, 136 Pac. 534. Declarations of the deceased wife concerning a joint bank account of herself and her husband, tending to show that the latter had no interest therein, are self-serving and inadmissible.—*Eaton v. Locey*, 22 Cal. App. 762, 136 Pac. 534. Where in an action by a husband against his wife to establish that certain property held by her was community property, the complaint counts upon an agreement whereby the plaintiff was to furnish money for the improvement of her separate property in consideration of the same becoming thereafter community property, and the answer denies the agreement and alleges a gift of the money, a finding against the agreement and that the money had been loaned to the defendant is outside of the issues and insufficient to support a personal judgment against her for the money loaned.—*Simmons v. Simmons*, 166 Cal. 438, 137 Pac. 21.

Where husband purchased property with community funds and directed that the deed be made to his wife with intent to make it her separate property, the deed vested it as her separate property, but intent to make it such was essential.—*Fanning v. Green*, 156 Cal. 279, 104 Pac. 308. Either spouse may hold the legal title to community property; and where land is acquired during coverture with community funds, although deeded to the wife, such property, unless made the subject of a gift from a husband to his wife, constitutes a part of the community estate of the marital relation.—*In re Carlin*, 19 Cal. App. 168, 124 Pac. 868.

(21) **Title in joint names, effect of.**—The mere fact that both a husband and his wife were named as the grantees in a deed would not operate, under section 164 of the Civil Code of California, to require a conclusion that the property purchased was community property.—*Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012. Where a conveyance is made to a married woman and to her husband, the presumption created by section 164 of the Civil Code of California, that the wife takes the part conveyed to her, as a tenant in common, is simply a prima facie presumption, except where a purchaser or incumbrancer in good faith and for a valuable consideration is concerned.—*Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012. A proviso in a deed, reserving to the grantors, who were husband and wife, "the right to the use, control, and proceeds of the property during their lives or the life of either of them," did not authorize the husband, during the lifetime of his wife, and without her consent, to execute any writing which would create a lien or easement as against her interest.—*Knoch v. Haizlip*, 163 Cal. 146, 124 Pac. 998.

(22) **Change of character of.**—Husband and wife may by contract change the character of their property from community to separate, and a court has the power to do so in an action between them, where such disposition is essential to a proper determination of their relative rights.—*Fay v. Fay*, 165 Cal. 469, 132 Pac. 1040. The mere acquirement of the possession of a wife's separate property by the husband, and his subsequent management and control of the same, all with her consent, do not show any intent on the part of the wife to make a gift of the property to the husband or to change its status from separate to community property. The presumption in such a case is that the property continues to be the separate property of the wife and that the husband holds it in trust for her, and it devolves on the trustee claiming a gift or change in the status of the property to show the same.—*Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012. Assuming that such a presumption exists in favor of the husband, evidence that the purchase was made by the husband wholly with money in his possession constituting the separate property of the wife is sufficient to controvert it, and to sustain a finding that he acquired no beneficial interest in the property so purchased.—*Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012. Any presumption as to the character of the property arising from

the fact of a married woman engaging in business is held to be overcome by the fact that the business was purchased with the funds and the rents, issues, and profits derived from moneys owned by the wife before marriage or acquired afterward by gift or bequest.—*Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 180, 125 Pac. 263. In action for divorce, evidence that husband had performed labor in erecting a house on the land of his wife, and gave her money to pay off a mortgage thereon, held not to make it community property.—*Carlson v. Carlson*, 10 Cal. App. 300, 101 Pac. 923. In an action for divorce, a finding that property is community property is not of fact but a conclusion of law reviewable on appeal.—*Carlson v. Carlson*, 10 Cal. App. 300, 101 Pac. 923. Specific real or personal property, if once separate property, remains so unless made community property by the owner's voluntary act; but gains or profits accruing through the personal individual efforts of the husband or wife during the marriage go into the community, even though separate property may have in a measure contributed to such gains.—*In re Buchanan's Estate*, 89 Wash. 172, 154 Pac. 129. Advances by a woman to a man for the purchase price of real property, even in consideration of marriage, do not make the property purchased community property.—*Morse v. Johnson*, 88 Wash. 57, 152 Pac. 677. If a woman owns a city lot as separate estate, it does not become part of the community by her husband's building a house thereon, provided, she pays him for it out of her separate funds.—*Glaze v. Pullman State Bank*, 91 Wash. 187, 157 Pac. 488. Where a statute goes no further than to exempt the earnings of the wife from liability for the debts of the husband, such earnings remain community property.—*Albright v. Albright*, 21 N. M. 606, Ann. Cas. 1918E, 542, 157 Pac. 662, 664. If a man signs a contract for the purchase of land, the fact that his wife refuses to enter into the contract does not change its character; it is still a community obligation; such objection does not make it the separate obligation of the husband.—*Baker v. Murray*, 78 Wash. 241, 138 Pac. 890. The legal effect of a deed from one member of a marital community to the other, under the provisions of section 8766, Rem. Code, is to convey the community property and title to the spouse who is the vendee, so that it becomes, or is converted into, his or her separate property, in which the community, as such, ceases to have any further title or interest.—*Brown v. Davis*, 98 Wash. 442, 444, 167 Pac. 1095. A widow may acquire title by prescription to property which in the lifetime of her husband was the latter's separate estate.—*Estate of McKenna*, 168 Cal. 339, 143 Pac. 605. Personal property acquired by a married woman in a state, in which there was no community property law, and brought by her into the state of Idaho, where she and her husband took up a residence, did not become community property.—*Gooding v. Lincoln County State Bank*, 22 Ida. 468, 474, 126 Pac. 772. Where a husband and wife, late of a state in which there was no community property law, take up their abode in Idaho, where the husband bought land with the proceeds of a sale of

property owned by him, solely in the state of their residence, the land so bought did not become community property.—*Douglas v. Douglas*, 22 Ida. 336, 341, 125 Pac. 796. A wife's separate property may undergo mutations and changes and yet maintain its separate character; however, the proof to trace and identify it in its changed condition must be clear and satisfactory.—*Ahlstrom v. Tage*, 31 Ida. 459, 174 Pac. 605. If, in a complaint, in a suit for community property undisposed of by a divorce decree, there is an allegation that this property "was not brought into court in said divorce proceedings nor divided by the court," the plaintiff negatives, sufficiently, the idea that there was any affirmative adjudication, or any occasion therefor, that there was, at the time of the divorce, no community property other than that mentioned in the decree.—*Harvey v. Pocock*, 92 Wash. 625, 159 Pac. 771. If, in a divorce suit, the pleadings and the decree both fail to mention some particular community personal property, in the hands of one of the parties, the other party, or his or her successor in interest, is not estopped to have the property divided by a subsequent suit.—*Harvey v. Pocock*, 92 Wash. 625, 159 Pac. 771. Community property undisposed of by a decree of divorce becomes common property instead of community property after the dissolution of the community by such decree.—*Harvey v. Pocock*, 92 Wash. 625, 159 Pac. 771. If, in divorce proceedings, there is any of the community property left undisposed of by the decree, the respective interests of the parties therein remain undisturbed, and either of these may, by another action, proceed thereafter to have his or her rights enforced in respect to it.—*Harvey v. Pocock*, 92 Wash. 625, 159 Pac. 771. In order to establish a community interest in what has been separate property, where the rights of third persons are involved, the evidence must be clear and convincing as to both there being such an interest and as to the extent of it.—*Morse v. Johnson*, 88 Wash. 57, 152 Pac. 677.

(23) Joint property.—Under the provisions of section 683, Civil Code, and section 16 of the Bank Act of 1909, in force at the time, an agreement in writing executed by a husband and wife that a deposit account opened that day in a savings bank in their joint names and all deposits to the same thereafter made by either of them, should be held and owned by them as joint tenants, created a joint estate, whether the wife understood the exact nature of the agreement or accepted its benefits or not, and the money deposited passed out of the community at the time of the deposit, and became the joint property of the husband and wife, invested with all the attributes of such property.—*In re Gurnsey's Estate*, 177 Cal. 211, 170 Pac. 402, 403. Where an aunt established a joint bank account for herself and her niece, and the niece thereafter deposited rentals from property theretofore transferred to her by the aunt, and the latter drew checks against said account for her own use, the inference is as reasonable that the niece took this method of providing for the aunt's support, which she was under obligation to do, as would be an inference that such deposits were made

under an agreement recognizing the aunt's real ownership of the property, and the finding to that effect will be upheld.—*Kelly v. Woolsey*, 177 Cal. 325, 170 Pac. 837, 841.

(24) **Community obligation and liability therefor.**—A married man who purchases corporate stock with money earned by him, his wife having nothing to do with the purchase, and, as a stockholder, signs a bond to secure an indebtedness of the corporation, does not thereby create a community obligation.—*Union Securities Co. v. Smith*, 93 Wash. 115, Ann. Cas. 1918E, 710, 160 Pac. 304. A husband's discharge in bankruptcy, from the obligation of a contract, executed by him and his wife, to sell community property, necessarily discharges the wife, her separate property not being subject to the community debts nor to the separate debts of her husband.—*Bimrose v. Matthews*, 78 Wash. 32, 39, 138 Pac. 319. The community interest of a man's deceased wife, in the hands of her child and heir, is answerable for moneys advanced to liquidate debts owing at the time of the mother's death, if a claim therefor be made within the period of the statute of limitations; otherwise, it is not so answerable.—*In re Mason's Estate*, *Mason v. Mason*, 95 Wash. 564, 164 Pac. 205.

REFERENCES.

Debts or claims for which community property is liable.—See note in Ann. Cas. 1913A, 319. Liability of community property to succession tax.—39 L. R. A. (N. S.) 1107.

(25) **Lien of judgment.**—A judgment against a married woman, in an action in which her husband has not been joined as a defendant, is not a judgment against the community and does not create a lien upon the community property.—*Conley v. Greene*, 89 Wash. 39, 153 Pac. 1089. Community property is not subject to the lien of a judgment recovered against one of the community for a tort not committed for the benefit of the community.—*Wilson v. Stone*, 90 Wash. 365, 156 Pac. 12.

(26) **Administration of.** In Washington.—Under the statutes of Washington, the whole of the community property is subject, on the death of either spouse, to administration for the payment of community debts, and for distribution.—*Tyan v. Ferguson*, 3 Wash. 356, 28 Pac. 910, 912; *Bank of Montreal v. Buchanan*, 32 Wash. 480, 73 Pac. 482, 483; but the administration of the separate estate of the deceased and of the community property is by one proceeding, in the sense that it is necessary for creditors to present their claims but once.—*Smith v. Ferry*, 6 Wash. 285, sub nom. *In re Hill's Estate*, 33 Pac. 585, 587. Upon the death of either the husband or the wife, the entire estate and not the portion owned by the deceased is subject to probate.—*F. T. Crowe & Co. v. Adkinson Const. Co.*, 67 Wash. 420, Ann. Cas. 1913D, 273, 121 Pac. 841, 843. Where an administration is had of the community property the same should be of the whole thereof and not merely of the half interest of the decedent.—*Magee v. Big Bend Land Co.*, 51 Wash. 406, 99 Pac. 17.

(27) **Payment of debts.**—The court having control of the administration, and of the community property for that purpose, is authorized to determine what charges, debts, and expenses are to be paid out of this property, and the amount thereof.—*Estate of Burdick*, 112 Cal. 387, 400, 44 Pac. 734. A testator may lawfully authorize his executor "to sell, dispose of, and convey any portion" of his estate, real, personal, or mixed, at either public or private sale, and for such price or prices as he may deem best; for the purposes of paying debts against his estate; and, for this purpose, the community property is to be deemed the property of the estate of the husband, within the meaning of such power. The husband's power to confer upon his executor an authority to sell such interest is not limited to the one-half of the community property of which he had the right of testamentary disposition. The appropriation of land, by a sale, to the payment of the claims to which it is made subject, is the same whether done under an authority given by the will, or by the direction of the court. In either case, it is an act done in the administration of the estate, and, if authorized by the statute, is equally binding upon all parties interested in the estate.—*Sharp v. Loupe*, 120 Cal. 89, 91, 93, 52 Pac. 134, 586. Family expenses are *prima facie* presumed to have been paid from community funds.—*Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360. The act of a married man who, without consulting his wife, makes an agreement, based on no consideration, to indemnify the sureties of a construction company in which neither he nor his wife is interested, does not bind the community property, the husband alone is answerable.—*American Surety Co. v. Sandberg* (Wash.), 225 Fed. 150, 157. The power of a husband to incur debts for which the community property is answerable, ends with the dissolution of the marriage.—*Johnson v. Garner* (Nev.), 233 Fed. 766.

(28) **Succession by widow.**—This subject has been greatly mystified by the inaccurate use of language in many of the opinions of the courts. Thus it is said that the wife receives community property not as the "heir" of her husband, but in her own right as her half of the property which was acquired by herself and her husband during the marriage.—*Estate of Burdick*, 112 Cal. 387, 400, 44 Pac. 734; and it has been reasoned that, if the "estate and expectancy" of the wife in the community property is dependent upon her survivorship; and that, in the event of her death before her husband, it is deemed never to have existed; the husband does not, on the death of his wife, as to the community property, take by descent or succession, but holds the community property as though acquired by himself, and as if his deceased wife had never existed.—*Estate of Rowland*, 74 Cal. 523, 525, 5 Am. St. Rep. 464, 16 Pac. 315. But it has been determined by the supreme court of California, after mature consideration, that the interest of the surviving widow in the community property is that of an heir and that she takes her share of the community by "succession" from the husband.—*Sharp v. Loupe*, 120 Cal. 89, 93, 52 Pac. 134, 586; *William Hill*

Co. v. Lawler, 116 Cal. 359, 363, 48 Pac. 323; Estate of Burdick, 112 Cal. 387, 44 Pac. 734; Cunha v. Hughes, 122 Cal. 111, 112, 68 Am. St. Rep. 27, 54 Pac. 535. It follows, that the surviving widow's title to one-half of the community property is to be administered as part of the estate of her husband. As in the case of any other heir of her husband, she is not entitled to an undivided portion of each piece of property of which her husband died seised, but only to one-half of the residue of his estate, which shall remain after paying the debts, family allowance, and charges and expenses of administration.—Sharp v. Loupe, 120 Cal. 89, 93, 52 Pac. 134, 586. It also follows, that if she takes her share of community property by "succession" from her husband, that a conveyance by her of her interest in any portion of the estate, pending administration, and before distribution, has no greater effect than would a similar conveyance by any other heir.—William Hill Co. v. Lawler, 116 Cal. 359, 363, 48 Pac. 323. Furthermore, whatever right she may have in the estate of which her husband died seised is to be ascertained by the same means as is the right of any claimant to his estate, whether by succession or by will.—Cunha v. Hughes, 122 Cal. 111, 112, 68 Am. St. Rep. 27, 54 Pac. 535. It seems that both husband and wife take such additional right as they acquire to the common property of the other, by inheritance. "The disposition," said Temple, J., in Estate of Burdick, 5 Cal. Unrep. 6, 40 Pac. 35, 36, "to hesitate to accept this conclusion does not arise from any ambiguity in our statutes, which I think and shall presently show, are very clear upon the subject, but from the fact that, during the existence of the community, the relation of the wife to the property, is, in some respects, quite different from that of a mere heir apparent. She has rights with reference to it which the courts will interfere to protect, and in case of a dissolution of the community by divorce, her right to one-half of the property immediately attaches, subject to the power of the divorce court to deprive her of it for her delinquency. But these statutory provisions do not show that the additional right which she acquires upon the death of her husband is not as heir, and the codes seem quite clear upon the subject." The one-half interest which, under the laws of Idaho, the wife receives from the community property upon the death of her husband comes to her in her own right by reason of the death of the community agent and her survival of the dissolution of the community partnership.—Kohny v. Dunbar, 21 Ida. 258, Ann. Cas. 1913D, 492, 39 L. R. A. (N. S.) 1107, 121 Pac. 544.

(29) Same. Succession by children and others.—In case a married man dies leaving descendants, his widow inherits one-half of the community property.—Scott v. Ward, 13 Cal. 458; Payne v. Payne, 18 Cal. 291; Jewell v. Jewell, 28 Cal. 232; Morrison v. Bowman, 29 Cal. 337. The "descendants" of a person include his children, grandchildren, and their children to the remotest degree. The descendants form what is called the direct descending line. The term is opposed to that of "ascendants," and it must be observed that those who are denominated

as "descendants" do not comprise all of those who come to the title by descent.—*Jewell v. Jewell*, 28 Cal. 232, 236. Upon a husband's death, the community property passes to his wife and children, one-half to her as survivor and one-half to them, share and share alike, and they hold the property as tenants in common.—*Schlarb v. Castaing*, 50 Wash. 331, 97 Pac. 289, 290. Upon the death of the husband, the widow takes one-half of the community property as heir, not as survivor.—*Estate of Moffitt*, 153 Cal. 359, 20 L. R. A. (N. S.) 207, 95 Pac. 653, 654, 1025; *Sharp v. Loupe*, 120 Cal. 89, 52 Pac. 134, 586; *Spreckels v. Spreckels*, 116 Cal. 339, 58 Am. St. Rep. 170, 36 L. R. A. 497, 48 Pac. 228; *Estate of Burdick*, 112 Cal. 387, 44 Pac. 734; *Estate of Angle*, 148 Cal. 102, 82 Pac. 668, 670. Upon a husband's death, one-half of the community property goes to his wife and the other half to his surviving children.—*Gage v. Downey*, 79 Cal. 140, 152, 21 Pac. 527, 855. One-half of the community property goes absolutely to the wife, and the remaining half to the descendants of the deceased husband—that is, to a particular class of his heirs—if not made by him the subject of testamentary disposition.—*Payne v. Payne*, 18 Cal. 291, 301; *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125; *Estate of Gwin*, 77 Cal. 313, 19 Pac. 527. Upon the death of the father, the land, if it is community property, passes under the statute of descents, one-half to the mother as her separate property, and one-half to the children, adults as well as minors, subject to the right of the mother to select a homestead therefrom. But if she fails to exercise this right, the children's portion vests in them in fee at her death, subject, of course, to the costs of administration and the provable debts against the estate of the father.—*Stewin v. Thrift*, 30 Wash. 36, 70 Pac. 116, 117. If a husband dies intestate, leaving no descendants, the surviving wife and surviving father of the deceased each inherit one-half of the husband's half of the community property.—*Jewell v. Jewell*, 28 Cal. 232, 237. In order to entitle a surviving husband or wife to the whole of the common property, it must be affirmatively shown that there are no descendants of the deceased, and no one entitled to take by descent.—*Cummings v. Chevrier*, 10 Cal. 519; *Jewell v. Jewell*, 28 Cal. 232, 236. If a husband dies leaving community property, and a will, whereby he devises all of his estate to his wife for life, and after her death to be equally divided between the children, the wife is entitled to one-half of the property absolutely in her own right, and to a life estate in the other half under the will.—*Estate of Silvey*, 42 Cal. 210, 212. If a husband gives to his wife a legacy, and bequeaths the remainder of the community property to his daughter, his wife is entitled to half of the property, and also to the legacy taken out of the other half that was subject to the husband's testamentary disposition.—*Payne v. Payne*, 18 Cal. 291, 301. The heirs of a divorced wife succeed to her interest in community property, where the decree of divorce directs an equal division of such property.—*McLeran v. Benton*, 31 Cal. 29, 33. Where real property was acquired from the government by a husband during marriage it was community

property and hence on the dissolution of the community by the death of the husband, the property passed without probate proceedings or other legal action—one-half to the widow and the other half to the children of the marriage.—*Molina v. Ramirez*, 15 Ariz. 249, 138 Pac. 17.

REFERENCES.

Succession to community property.—See note following the table after § 41, ante, head-line 2, subd. 2, ante.

(30) **Distribution of. Conclusiveness.**—The judgment of a court having jurisdiction over the subject-matter, determining the amount of property which a surviving widow is entitled to receive at the close of the administration, is binding upon her, and may also be invoked by her as a determination of her right to the same. Whether this be called a decree of distribution, or a judgment or order fixing the amount or extent of her interest in the estate, and her right to receive the same from the administrator, is immaterial. It is the final determination of the court upon the subject within its jurisdiction, and is as binding upon her as if she had been specifically named in the statute.—*Estate of Burdick*, 112 Cal. 387, 400, 44 Pac. 734; *Cunha v. Hughes*, 122 Cal. 111, 113, 68 Am. St. Rep. 27, 54 Pac. 535. A surviving widow has the privilege of electing to take in accordance with her deceased husband's will, rather than to claim her right as surviving widow to the one-half of his estate, but if she fails to appear, upon application for the distribution of his estate, and to present her claim for an undivided half of the estate, her rights therein are concluded by the decree of distribution, and if not appealed from, such decree becomes conclusive.—*Cunha v. Hughes*, 122 Cal. 111, 113, 68 Am. St. Rep. 27, 54 Pac. 535. Where on the death of a husband the probate court assigned community real property worth less than \$2000 to the widow and minor children, the law vested title to the property—one-half to the widow and the other half in the children—without reference to the community character of the property, as provided by the Civil Code of Arizona, 1901, par. 1729.—*Molina v. Ramirez*, 15 Ariz. 249, 138 Pac. 17. Where real property worth less than \$2000 was the only asset of a decedent's estate the probate court, after payment of the expenses of the last illness and funeral charges and the expense of administration, was required by Civil Code of Arizona, 1901, par. 1730, to assign the property to the widow and minor children for their use and support, after which there could be no further administration proceedings unless further estate was discovered.—*Molina v. Ramirez*, 15 Ariz. 249, 138 Pac. 17. A husband having died leaving land worth less than \$2000 as his estate, and the probate court having assigned the same to the widow and minor children as required by Civil Code of Arizona, 1901, par. 1730, it had no subsequent jurisdiction to authorize the administratrix to sell the land, and an order and judgment attempting to confer such authority was void.—*Molina v. Ramirez*, 15 Ariz. 249, 138 Pac. 17. A husband died leaving a widow and minor

children, and 160 acres of community property, which was the only asset of his estate. This land was worth less than \$2000 and on application by the widow, who was administratrix, it was awarded to her and the minor children for their use and support, as authorized by Civil Code of Arizona, 1901, par. 1730, notwithstanding it would have vested in them to the same extent without any such order because of its community character. Thereafter the administratrix applied for and was granted an order to sell the land, which order was void for want of jurisdiction, and under this issue she sold the land, executing a deed describing the grantor as administratrix. Held that such deed was not void, but the word "administratrix" could be regarded as mere *descriptio personae*, and the deed upheld as a conveyance of the widow's interest in the land.—*Molina v. Ramirez*, 15 Ariz. 249, 138 Pac. 17.

REFERENCES.

Distribution of community property upon the death of either spouse.
—See notes *Kerr's Cyc. Civ. Code*, §§ 1401, 1402.

2. Separate property.

(1) In general.—The property of a husband and wife is divided into two classes, namely, the separate property of each spouse, and community property.—*Hall v. Johns*, 17 Ida. 224, 228, 105 Pac. 71. Where a man and woman lived together as husband and wife without being legally married and the woman died and an administrator was appointed of her estate and the man up to the time of an application for distribution permitted it to be regarded as community property and then claimed it as his separate property, held that as there was no marriage there could be no community and the man's claim was allowed but subject to payment of expenses of administration and of a guardian ad litem of an infant heir.—*Sloan v. West*, 63 Wash. 623, 116 Pac. 273. Where husband at time of his marriage had money invested in his business, it was his separate property and profits due to capital invested were separate property under Civil Code of California, section 63.—*Pereira v. Pereira*, 156 Cal. 1, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880, 103 Pac. 488. The separate character of an estate will not be affected by the fact that the husband borrows money on the property upon the representation that he owns it, nor is it affected by the fact that the husband purchases materials used for improvements thereon.—*Farnum v. Kern Valley Bank*, 12 Cal. App. 426, 107 Pac. 568. As a rule neither spouse has any interest in the separate property of the other. (Civil Code of California, section 157.) —*Union Oil Co. v. Stewart*, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313. Where, of two partners in business, the especial business of the one is to conduct a saloon, and that of the other to gamble with the patrons, the earnings being deposited in bank, if the saloon keeper marries and thereafter dies, intestate and without issue, his portion of the deposit as of the period preceding the marriage is to be re-

garded as separate estate, and that subsequently deposited as community.—*Estate of Gold*, 170 Cal. 621, 151 Pac. 12. A husband can convey his separate property without his wife's joining in the deed.—*Powers v. Munson*, 74 Wash. 234, 237, 133 Pac. 453. A person who takes a note payable to his estate may make a valid disposal of it during his lifetime by accepting payment or releasing the maker.—*Poole v. Poole*, 96 Kan. 84, 150 Pac. 592. If a wife, on her husband's death, believing in good faith that money in a bank is her own, under a conveyance made to her by the deceased, uses such money along with her separate estate to pay the funeral expenses and to satisfy the community debts, she should not be required to account therefor to an administrator afterwards appointed.—*Sponogle v. Sponogle*, 86 Wash. 649, 151 Pac. 43.

(2) Defined.—The statute defines what is the separate estate of the husband, and what is the separate estate of the wife. As to when a separate purchase of land by a surviving spouse from the government is the separate property of the survivor, see *Carratt v. Carratt*, 32 Wash. 517, 73 Pac. 481. In Colorado, the surviving husband inherits half of his wife's estate subject to her debts.—*Nichols v. Lee*, 16 Colo. 147, 26 Pac. 157. Property acquired by the wife after marriage "by gift, bequest, devise, or descent," is her separate property.—*Bell v. Wyman*, 147 Cal. 514, 82 Pac. 39. "All property, real and personal, owned by either husband or wife, before marriage, and that acquired by either of them afterwards by gift, devise, or descent, shall be their separate property."—Cal. Const. of 1879, art. xx, § 8. The old constitution of the state contained a similar provision. "All property which can be shown to belong to the separate estate of the wife, by satisfactory testimony, whether the same be real, personal, or mixed, and all the rents, issues, profits, and increase thereof, whether the same be the fruit of trade and commerce, of loans and investments, or the spontaneous production of the soil, or wrested from it by the hand of industry, is, under the constitution, sacred to the use and enjoyment of the wife. The manifest object of the framers of the constitution was to protect the wife, as well during the lifetime of the husband, as after his death, should she survive him, against the consequences of his improvidence or misfortune, by securing to her, separate and apart from him, such property as she may hold in her own right at the time of marriage, and such as she may afterwards acquire by gift, devise, or descent. The constitution, therefore, to that end, departs widely from the rules of the common law, and, in effect, provides that the relation of the wife to her property, so far as title, use, and enjoyment are concerned, shall not be prejudiced by the fact of coverture, and that no legal or beneficial interest therein shall thereby pass or vest in the husband. In this respect, it does away with the common law results of marriage, and preserves and continues in the wife the rights of a feme sole, and thus presents to her, already drafted and engrossed, a marriage settlement which is more solemn than private

compacts, and is beyond the reach of legislative interference. Nor can the rights thus secured be frittered away by a judicial construction which can assign no better reason than a lingering fondness for the harsh ideas of the common law."—*Lewis v. Johns*, 24 Cal. 98, 103, 85 Am. Dec. 49, per Sanderson, C. J. Separate property is, besides property acquired by the husband or wife before marriage, that coming to either, after marriage, by gift, devise, or inheritance, and the rents, issues, and profits therefrom.—*Fiedling v. Kettler*, 86 Wash. 194, 149 Pac. 667. If an antenuptial contract, whereby property acquired after marriage is to be the joint or community property of both spouses, is silent as to the rents, issues, and profits of the separate property of the contracting parties, such rents, issues, and profits are, under the statute of the state of Washington, the separate property of the spouse from whose property they spring.—*Clark v. Baker*, 76 Wash. 110, 115, 135 Pac. 1025. A government homestead entry having been made on land and an equity earned therein prior to marriage the land is the separate property of the entryman under section 2679, Rev. Codes of Idaho.—*Humbird Lumber Co. v. Doran*, 24 Ida. 507, 135 Pac. 66. Where land was acquired from the United States under the homestead laws by an applicant who had never been married when he filed thereon but who married before he made final proof and received patent and subsequently died intestate without having parted with the land, such land is separate and not community property.—*Teynor, v. Heible*, 74 Wash. 222, 46 L. R. A. (N. S.) 1033, 133 Pac. 1. An allegation or finding that a person is the owner of certain property is none the less an allegation or finding of an ultimate fact, because the question of ownership depends upon the application of rules of law to the facts shown.—*Estate of Hill*, 167 Cal. 59, 138 Pac. 690.

REFERENCES.

Separate property of the wife and of the husband.—See notes *Kerr's Cyc. Civ. Code*, §§ 162, 163. Does conveyance by husband to wife create separate estate?—See note 69 L. R. A. 370-374. Liability of separate estate of wife for her funeral expenses.—See note 6 L. R. A. (N. S.) 917.

(3) *Presumption*.—Section 164 of the Civil Code of California provides that whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. This is merely a rule of evidence fixing the burden of proof in cases where the question of ownership is in litigation, and where property is purchased with community funds, but conveyed to the wife, the latter is not required to prove that it was a gift, but it devolves upon the husband, to overcome the presumption by showing that it was not a gift.—*In re Carlin*, 19 Cal. App. 168, 124 Pac. 868. Under that section, where a gift by the husband to the wife is essential to the theory that the property conveyed to the wife is her separate property, such a gift on the part of the husband will be presumed.—*Shaw v. Bernal*, 163 Cal. 262, 124

Pac. 1012. Such presumption, as between the husband and wife, while only prima facie, is controlling, in the absence of evidence showing a contrary intention on the part of the husband.—*Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012. The presumption of that section as it existed prior to 1889, that property conveyed to either husband or wife after their marriage, other than as a gift, was community property, is inapplicable to conveyances between themselves.—*Estate of Klumpke*, 167 Cal. 415, 139 Pac. 1062. Under that section, as amended by Stats. 1889, page 328, providing that property conveyed to a married woman is presumed to be her separate property, the law regards such property as her separate estate though the consideration was paid out of community funds, and the husband has the burden of showing that it was not gift.—*Killian v. Killian*, 10 Cal. App. 312, 101 Pac. 806. Where title to property acquired during coverture is at husband's request taken in name of wife, he has burden to overcome the presumption created by that section, as amended by Stats. 1889, page 328, which is not done by proof of an undisclosed intention but by acts and declarations at the time.—*Killian v. Killian*, 10 Cal. App. 312, 101 Pac. 806. Where land in the state of California is purchased by the husband in the name of the wife, either with his separate funds or with community funds, the presumption arises that a gift of such land to the wife was intended; and under section 164 of the Civil Code of that state, the presumption is that the title is thereby vested in the wife as her separate property. The burden to overcome such presumption rests upon any one interested in attacking the wife's title to produce competent evidence of sufficient weight to show that the husband did not intend such property as a gift to his wife.—*Carle v. Heller*, 18 Cal. App. 577, 123 Pac. 815. Under some statutes there is a presumption that property conveyed to a wife in writing is her separate estate, which presumption is conclusive in favor of purchasers or incumbrancers in good faith and for valuable consideration.—*Farnum v. Kern Valley Bank*, 12 Cal. App. 426, 107 Pac. 568. Where real estate is conveyed to a married woman, a presumption arises that the title thereto is vested in her as her separate property. The burden is then upon the husband, who contends that the property belongs to the community, to overcome the presumption by clear and convincing evidence; and his surmise or belief that the property was purchased with community funds, based on his ignorance of the fact that the wife had any separate property, is insufficient to overcome the presumption.—*Lenninger v. Lenninger*, 167 Cal. 297, 139 Pac. 679. The mere acquirement of the possession of the wife's separate property by the husband and his subsequent management and control of the same, all with her consent, do not show any intent on the part of the wife to make a gift of the property to the husband or to change its status from separate to community property, but the presumption in such a case is that the property continues to be the wife's separate property, and that the husband holds it in trust for her and that under such circum-

stances it devolves upon him, claiming a gift or change in the status of the property, to show the same.—*Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012. In the absence of evidence sufficient to overcome the title of the wife in the property originally acquired by her from her husband's funds, as her presumed separate estate, and in the absence of any further showing of the loss of such title, the presumption is that the proceeds of the sale of his original separate estate continued as her separate estate.—*Carle v. Heller*, 18 Cal. App. 577, 123 Pac. 815. The presumption with regard to property conveyed to wife in her own name is overcome where it appears that the property was purchased with community funds and that the husband did not intend to give it to the wife.—*Fulkerson v. Stiles*, 156 Cal. 703, 26 L. R. A. (N. S.) 181, 105 Pac. 966.

(4) Evidence.—The same considerations apply to an averment or finding that certain property owned by a married person is separate or community property. The evidence from which this ultimate fact is determined is not to be set forth in a pleading nor need it be found by the court.—*Estate of Hill*, 167 Cal. 59, 138 Pac. 690. Sworn statements by the wife in her inventory of her husband's estate, and in her application for a homestead, that the property was his separate estate are evidence against her successors in interest.—*Estate of Hill*, 167 Cal. 59, 138 Pac. 690. In this action by the purchaser of a yacht from the husband, who took it in payment of a pre-existing debt, to establish his title thereto as against the wife, there was evidence sufficient to support the finding that the plaintiff knew of the wife's claim and the purchase of the property with her separate funds.—*Dyment v. Nelson*, 166 Cal. 38, 134 Pac. 988. In this action for a divorce evidence tending to show that certain real estate was paid for with community funds was insufficient to sustain the finding of the trial court that the property belonged to the community, where the conveyance of the property was to her, and there was evidence that before and at the time of the marriage she had sufficient funds to purchase the property, and she testified positively that she purchased it with such money alone.—*Lenninger v. Lenninger*, 167 Cal. 297, 139 Pac. 679. It is held that the testimony of the widow supports her complaint, and fairly discloses that the property claimed was regarded by the spouses as the separate property of the wife, and is not only sufficient to preclude a nonsuit, but, if submitted on her testimony alone, would have supported a judgment in her favor.—*Larson v. Larson*, 15 Cal. App. 531, 115 Pac. 340.

(5) What law governs.—Personal property acquired during coverture is governed and controlled by the law of the matrimonial domicile, and if the title thereto and property therein was vested in the husband under the law of the domicile, it will be presumed everywhere to be his property, and the same is true of any property of the wife under the law of the matrimonial domicile.—*Douglas v. Douglas*, 22 Ida. 336, Probate Law—157

125 Pac. 796. Where husband and wife during coverture accumulated property in a state where the community law did not exist and where property accumulated and acquired during coverture vested absolutely in the husband and such property or the proceeds thereof was taken into the state of Idaho and there invested in real property, the property so acquired was the separate property of the husband.—*Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796. Where no proof is shown to the contrary, the presumption arises in the courts of Idaho that the community property law prevails in a sister state, the same as it prevails in Idaho.—*Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796. In inquiring into and ascertaining the law of a sister state with reference to the title and ownership of property acquired by husband and wife in that state during coverture, the courts of Idaho do not make such inquiry for the purpose of executing a foreign law in Idaho, but rather to ascertain the status of the foreign law as a probative fact in ascertaining and establishing the title and ownership of such property at the time it was taken into Idaho.—*Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796. If a husband and wife acquire personal property in one state, and then remove with the same into a state in which the community property law prevails, the law of the state where they lived when the property was acquired will govern as to whether it be separate or community property.—*In re Niccoll's Estate*, 164 Cal. 368, 129 Pac. 278, 280. Real property purchased in the state of California with money accumulated in the state of Illinois by a man and wife during their marriage is not community property, but the separate property of the husband, as there is not in the state of Illinois any such thing as community property.—*Estate of Warner*, 167 Cal. 686, 140 Pac. 583, 585. Separate personal property enjoyed under the law of the domicile by one of the spouses at the time it was acquired is not lost by its investment in real property in another jurisdiction where a different law is in force.—*Estate of Warner*, 167 Cal. 686, 140 Pac. 583, 585.

REFERENCES.

Estoppel against married women is the subject of a note in 57 Am. St. Rep. 169.

(6) What is separate property of wife.—Where a conveyance of separate property is made to a woman directly by her husband, or by a third person at his direction, the property becomes her separate estate.—*Rauer's Loan & Collection Co. v. Berthiaume*, 21 Cal. App. 670, 132 Pac. 596. A gift by a man to his wife of an undivided one-half of real estate becomes her separate property.—*Lapique v. Geantit*, 21 Cal. App. 515, 132 Pac. 78. A woman may perform services for her husband under a contract with him for money, provided the service is for work outside of the family relation, and her wages become her separate property.—*Moore v. Crandall*, 205 Fed. 689, 124 C. C. A. 11. When a married woman borrows money upon the credit of her separate property, the money so borrowed is her own and not

a part of the community assets.—*Dyment v. Nelson*, 166 Cal. 38, 134 Pac. 988. A yacht purchased with such borrowed money is the separate property of the wife, notwithstanding the husband joined in the giving of the notes for the loan, and title to the yacht was taken and registry made in his name.—*Dyment v. Nelson*, 166 Cal. 38, 134 Pac. 988. Property purchased with the proceeds of a sale of separate property is separate property. Evidence held sufficient to show that land was purchased with money which was originally wife's separate property.—*De Gotardi v. Donati*, 155 Cal. 109, 99 Pac. 492. When a husband purchases property with his wife's money, taking title in himself, contrary to her instructions, the property is not liable for his debts.—*Gladstone Lumber Co. v. Kelly*, 64 Or. 163, 129 Pac. 764. The execution and delivery of a grant, bargain, and sale deed by a husband to his wife of his separate property for an expressed consideration of \$10, constitutes a gift to the wife, where no consideration is in fact paid, notwithstanding the property continued thereafter to be occupied as the family residence and the husband paid the taxes and expenses of repairs on the property.—*Estate of Klumpke*, 167 Cal. 415, 139 Pac. 1062. Sections 162-164 of the Civil Code of California, do not apply so as to render property acquired by adverse possession community property.—*Union Oil Co. v. Stewart*, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313. If title by adverse possession is founded on a presumed grant to the wife, under section 164 of that code, such grant raises a presumption that it is the wife's separate property.—*Union Oil Co. v. Stewart*, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313. Section 169 of that code, declaring that earnings and accumulations of wife and of children, while living separate from her husband, are her separate property, clearly includes, by the word accumulations, property acquired by adverse possession.—*Union Oil Co. v. Stewart*, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313.

(7) Married woman's rights.—Under the statutes of the state of Idaho a married woman is given the absolute control of her separate property and estate and has the power and right to contract with reference thereto and she may create a debt against herself personally when such debt is created for her own use and benefit and for the use or benefit of her separate estate.—*McFarland v. Johnson*, 22 Ida. 694, 127 Pac. 912. Under the laws of Colorado the husband has no vested right, inchoate or other, by reason of the marital relation, in the property belonging to his wife, and she holds an absolute legal estate in her real and personal property, whether owned at the time of marriage or acquired during coverture, as free from any common law right of her husband as if she were unmarried.—*Deutsch v. Rohlfing*, 22 Colo. App. 543, 126 Pac. 1126. Where a levy is made to pay a judgment against the husband upon the proceeds of a grocery business, which business is claimed to be the separate property of the wife, evidence that the grocery was purchased by the wife on her own credit with the proceeds of the property inherited from relatives

established the fact that the property is the separate property of the wife, and not subject to the payment of the debts of the husband.—*Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 179, 125 Pac. 263. The finding of the trial courts that the property levied upon in such case is the property of the wife must be based upon clear and convincing evidence; but the sufficiency of the evidence is for the trial courts.—*Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 179, 125 Pac. 263, following *Couts v. Winston*, 153 Cal. 686, 96 Pac. 357, and *Estate of Pepper*, 158 Cal. 619, 31 L. R. A. (N. S.) 1092, 112 Pac. 62. The presumption as to the character of the property managed and conducted by a husband is overcome by evidence of the married woman engaging in business and that the property in question was purchased with funds and the issues, rents, and profits derived from money owned by the wife before marriage or acquired afterward by gift or devise.—*Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 179, 125 Pac. 263. The fact of the contribution to the business of the time and skill of the husband in managing and conducting a business which was purchased with the separate funds of the wife, and the fact that he joined his wife in the execution of notes concerned with the conduct of the business, in the absence of any agreement to that effect, does not give him any interest in the property.—*Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 179, 125 Pac. 263. In an action by a wife for the wrongful conversion of a fund, claimed as her separate property, for the debt of the husband contracted before marriage, the finding of the court in favor of the plaintiff is sufficiently supported by evidence tending to show that the fund converted was the product of a grocery business, purchased with her separate means, inherited from an aunt, and that her husband had no estate of his own, but merely held her general power of attorney to transact business for her, and that all dealings by him were upon her account and credit.—*Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 180, 125 Pac. 263. Officials of the bank which made loans to the plaintiff were properly permitted to testify that in making said loans they recognized the plaintiff as the party borrowing the money and extended the credit to her alone. There was no prejudicial error in this ruling, particularly as it was shown that she was the only member of the marital community who possessed any estate.—*Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 180, 125 Pac. 263. Neither the fact that the husband contributed all his time and skill in the conduct of the business owned by the wife nor that he joined his wife in the execution of notes given for money wherewith to make the purchase (assuming that he did), in the absence of any agreement to that effect, gave him any interest in the wife's property.—*Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 180, 125 Pac. 263. It is held that the record shows no facts which could estop the plaintiff from claiming the fund as her own as against a debt contracted by the husband before marriage, or tending to show any act on her part

whereby she transmuted her separate estate into community property, but that the execution of a general power of attorney to the husband is inconsistent with an intent to transmute her separate estate in such fund into community property.—*Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 180, 125 Pac. 203. A married woman may own, hold, and control her separate property as fully and completely as the husband can. (Civil Code of California, section 162.)—*Union Oil Co. v. Stewart*, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313. This doctrine has been extended even to allowing one spouse to acquire the land of the other by adverse possession.—*Union Oil Co. v. Stewart*, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313. A wife may hold land adversely to her husband.—*Union Oil Co. v. Stewart*, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313. When the husband has left his family, ceased to contribute to its support, and abandoned his property to the use of his wife for the purpose of her acquiring adverse possession, public policy does not prevent her from acquiring the same rights with respect to property left in her hands as if she were unmarried.—*Union Oil Co. v. Stewart*, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313. A wife can not acquire title to the husband's land by adverse possession while they are living together and he remains head of the family, since under the Civil Code of California, section 167, neither spouse can be excluded from other's dwelling.—*Union Oil Co. v. Stewart*, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313. A wife's separate property is not ordinarily liable for her support, except when the community property fails and the husband fails to pay from his separate estate, but the wife may consent to the use of her separate estate to pay living expenses. (Civil Code of California, sections 174, 176.)—*Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360. A promissory note given to a married woman, with her husband's consent and approval, upon consideration that they would permit the promisor to make his home in their house whenever he desired was the separate property of the wife.—*Cullen v. Bisbee*, 168 Cal. 695, 697, 144 Pac. 968. The statutory limitations upon the wife's disposition of her separate property were designed mainly for her own protection, and, in view of article XI, section 14, of the constitution, not to deprive her of any power over her estate; but they prescribed merely the mode of exercising that power.—*Steinberger v. Young*, 175 Cal. 81, 165 Pac. 432, 435. If a married woman has separate property, that fact imposes no duty upon her to inform persons about to give credit to her husband that this property is hers alone.—*Glaze v. Pullman State Bank*, 91 Wash. 187, 157 Pac. 488. Where the interest that a married woman mortgages is not a homestead, but separate real property, it is not necessary for her husband to join in the execution of the mortgage.—*Booth Mercantile Co. v. Murphy*, 14 Ida. 212, 220, 93 Pac. 777. (Citing Rev. St. 1887, § 2921.) The community property is not bound for the payment of post-nuptial contracts of the wife made for the use and benefit of her own sepa-

rate property.—*Hall v. Johns*, 17 Ida. 224, 229, 105 Pac. 71. The wife can not, either directly or indirectly, make the community property liable for her debts, which are contracts for the benefit of her separate property, for her own use and benefit.—*Hall v. Johns*, 17 Ida. 224, 231, 105 Pac. 71. Under the statute of Idaho, the wife may dispose of her separate property without the signature of her husband.—*Stewart v. Weiser Lumber Co.*, 21 Ida. 340, 344, 121 Pac. 775. A married woman's separate real property is not answerable for a community obligation created by her husband.—*Glaze v. Pullman State Bank*, 91 Wash. 187, 157 Pac. 488. A wife's rights in family personalty is not contingent, like dower or survivorship, but a present estate; and, although, under the statute, the husband is made manager with full power to sell and dispose of this personalty, he can not give it away.—*Marston v. Rue*, 92 Wash. 129, 159 Pac. 111.

(8) *Effect of husband joining in mortgage.*—Money borrowed on the faith of the wife's separate estate is her separate estate in the absence of a showing to the contrary. The mere fact that the husband joined with the wife in a mortgage loan on her separate estate, at a time when he owned no property, does not indicate that he owned any interest in the mortgage on the property, especially where it appears that such mortgage loan was paid mostly out of the rents and profits of the wife's separate estate, which were her separate property, and that the small residue was paid out of the proceeds of the sale of her separate estate.—*Carle v. Heller*, 18 Cal. App. 577, 123 Pac. 815. If a man joins his wife in a mortgage of her separate property, made in order to obtain money to preserve this property from loss under tax foreclosure, the application of the money to the designed purpose does not make the property community property and subject to the claims of existing judgment creditors of the community.—*Graves v. Columbia Underwriters*, 93 Wash. 196, 160 Pac. 436. The fact that a man joins his wife in the execution of a mortgage is not conclusive of the fact that the property mortgaged is community property.—*Glaze v. Pullman State Bank*, 91 Wash. 187, 157 Pac. 488.

(9) *Improvements.*—Where improvements are placed on property belonging to either the husband or the wife, although purchased with community funds, such improvements will follow the title to the property, and will belong to the party who owns the land.—*Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012. Where a husband deliberately constructs from community funds a building upon the separate property of his wife, in the absence of any sufficient agreement or undertaking to the contrary, as between him and her, the title to the building follows the title to the land, and is the separate property of the wife, and neither he nor the marital partnership has any title to any portion of the property, either land or building.—*Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012. Such vesting of the title in the wife as her separate property is not affected by the fact that the husband received the

rents from the building so constructed and placed them to his credit in a bank.—*Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012.

(10) *Commingleing of funds.*—Where a contemporaneous sale was made of the wife's separate property, and of a lot belonging to the husband, and the proceeds of the sale of each was known, the mere fact that all of the proceeds were deposited alternatively in the names of the husband "or" wife did not of itself constitute evidence tending to disprove the presumption that the husband gave to the wife the property from the sale of which her part of such proceeds was derived; neither does such fact, standing alone, show that the wife intended to give to the husband any part of her interest in the land.—*Carle v. Heller*, 18 Cal. App. 577, 123 Pac. 815. There can be no commingling of separate and community property, where there is no community property.—*Clark v. Baker*, 76 Wash. 110, 116, 135 Pac. 1025. The mere commingling of the funds on deposit belonging to the husband and wife does not render the interest of each party not clearly ascertainable. Where it appears that by investment a part of the proceeds of the wife's separate estate became vested in the husband, and the residue remained in the wife, she is entitled to the whole residue remaining in her as her separate estate, and no part thereof can be claimed by the heirs of the deceased husband.—*Carle v. Heller*, 18 Cal. App. 577, 123 Pac. 815. The commingling and loss of identity of the separate property, while a circumstance tending to show an agreement to convert the same into community property, does not destroy the trust, and even where the identity of the separate property is lost, the trust may be enforced by personal judgment, provided, of course, that the allegations authorize a personal judgment.—*Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360. The commingling and loss of identity of separate property does not destroy a trust by converting the separate property into community property.—*Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.

(11) *Trust in, by husband.*—An express or resulting trust of the separate property by the husband, when established by the wife, is not prevented from enforcement by the doctrine of laches, when the husband is not prejudiced by the delay in enforcing the trust, and when an express trust exists, the statute of limitations does not begin to run until the trustee repudiates the trust.—*Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360. Where the wife commits money of her separate estate to custody and control of husband upon his agreement that he will keep it or invest it for her, trust established is express trust.—*Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360. A payment of part of the price of land by the husband with the wife's money held in trust by him is the same, in legal effect, as between parties, as payment by her, and created a resulting trust in her favor for interest which equaled her proportion of the price.—*Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474,

111 Pac. 360. The relation of the parties and their conduct with respect to the wife's money justified a finding of trust.—Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 Pac. 360. The possession and control of a wife's separate property by a husband with her consent raises a presumption that he holds it in trust for her.—Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 Pac. 360. The Civil Code of California, sections 2221, 2222, do not change that rule.—Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 Pac. 360.

(12) *Loan or gift of, to husband.*—The husband has the burden of showing a loan or gift of the wife's separate property to him, which, however, may be done either by proof of an express agreement or by circumstantial evidence.—Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 Pac. 360. The mere acquisition, by a husband, of the possession of his wife's separate property, and his subsequent management and control of the same with her consent, do not show an intent to make a gift to the husband.—Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 Pac. 360. A gift may be shown by the husband by proving the nature of the transaction and circumstances, as well as by evidence of an express agreement.—Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 Pac. 360. Evidence held insufficient to show a gift of the wife's separate property to her husband.—Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 Pac. 360.

(13) *Distribution.*—When the separate property of either spouse is intermixed or commingled with community property, so that the separate property has lost its identity, and can not be clearly traced or segregated, the community, being the paramount estate, draws the whole mass to it, and it becomes community property. "The general rule laid down by the courts is, that such confusion works a forfeiture of the separate character of the property so commingled. But where the community interest is inconsiderable in the property with which it has been intermingled, the community will not draw it to the separate estate."—Estate of Cudworth, 133 Cal. 462, 467, 65 Pac. 1041, quoting from Ballinger on Community Property. And where the separate property of a husband can be traced, the original capital and its transmutations, when it passes into his estate, are still separate property equally with the rents, income, and profits derived therefrom. But if there has been a great shrinkage in the husband's personal property, at the time of his death, as compared with what would naturally be derived from his income, the court should not decree that the personal property of the estate of said decedent is community property, but should decree that it is his separate property, and that it be distributed accordingly.—Estate of Cudworth, 133 Cal. 462, 468, 469, 65 Pac. 1041. Where a man, all whose property is of the community sort, leaves to his wife by will certain lots, "subject to the leases that may be in effect," and then makes a deed of the lots to her, in fee, retaining certain leasehold interests, these interests, if held by him

at the time of his death, are part of the community property and in a distribution of the estate pass as included therein.—Estate of Atwell, 174 Cal. 216, 162 Pac. 896.

(14) **Appeal.**—Where community property is taken in the wife's name, whether or not it was intended as a gift by the husband to his wife is a question of fact to be determined by the trial court, and its conclusion, unless manifestly without sufficient support, will not be disturbed by an appellate court.—In re Carlin, 19 Cal. App. 168, 124 Pac. 868. In this proceeding between the heirs of a husband and those of his wife to determine heirship to his estate, the finding that a certain tract of land was his separate property, and not the property of the community, is a finding of fact, not a conclusion of law, and it has sufficient support in the evidence.—Estate of Hill, 167 Cal. 59, 138 Pac. 690. On this appeal in proceedings between the heirs of a husband and those of his wife to determine heirship to his estate, the probative facts in the finding are not inconsistent with the conclusion that the property was his separate property. There being no finding that the purchase price paid by him for the property was not his separate property, the appellate court can not, for the purpose of overthrowing the ultimate finding of the separate character of the property, read into the findings one to the effect that the purchase money was community property.—Estate of Hill, 167 Cal. 59, 138 Pac. 690.

PART XVIII.

ESTATES OF MISSING PERSONS.

CHAPTER I.

ESTATES OF MISSING PERSONS.

- § 1041. Trustees for. Appointment of, by court.
- § 1042. Bond to be given by trustee.
- § 1043. Powers and duties of trustee.
- § 1043.¹ Unclaimed bank deposits. Twenty years.

ESTATES OF MISSING PERSONS.

- 1. Invalidity of statute.
- 2. Presumption of death.

§ 1041. Trustees for. Appointment of, by court.

Whenever any resident of this state, who owns or is entitled to the possession of any real or personal property situate therein, is missing, or his whereabouts unknown, for ninety days, and a verified petition is presented to the superior court of the county of which he is a resident by his wife or any of his family or friends, representing that his whereabouts has been, for such time, and still is, unknown, and that his estate requires attention, supervision, and care of ownership, the court must order such petition to be filed, and appoint a day for its hearing, not less than ten days from the date of the order.

NOTICE.—The clerk of the court must thereupon publish, for at least ten days prior to the day so appointed, a notice in some newspaper published in the county, stating that such petition will be heard at the court-room of the court at the time appointed for the hearing. The court may direct further notice of the application to be given in such manner and to such persons as it may deem proper.

HEARING.—At the time so fixed for such hearing, or at any subsequent time to which the hearing may be postponed, the court must hear the petition and the evidence offered in support of or in opposition thereto, and, if satisfied that the allegations thereof are true, and that such person remains missing, and his whereabouts unknown, must appoint some suitable person to take charge and possession of such estate, and manage and control it under the direction of the court.

WHO TO BE PREFERRED.—In appointing a trustee, the court must prefer the wife of the missing person (if any such there is) or her nominee, and, in the absence of a wife, some person, if such there is who is willing to act, entitled to participate in the distribution of the missing person's estate were he dead.—*Kerr's Cyc. Code Civ. Proc.*, § 1822.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Laws of 1915, chapter 9, page 9 (disposition of estates of persons who have disappeared).

Arizona—Revised Statutes of 1913, paragraph 3850.

Oregon—Laws of 1917, chapter 249, page 477; providing for administration of estates of persons not heard from in seven years.

§ 1042. Bond to be given by trustee.

Every person appointed under the provisions of the preceding section must give bond in the amount and as provided for in section thirteen hundred and eighty-eight.—*Kerr's Cyc. Code Civ. Proc.*, § 1822a.

§ 1043. Powers and duties of trustee.

The trustee must take possession of the real and personal estate in this state of such missing person, and collect and receive the rents, income, and proceeds thereof, collect all indebtedness owing to him, and pay the expenses thereof out of the trust funds, and pay such indebtedness of the missing person as may be authorized by the court. The court may direct the trustee to pay to

the person or persons constituting the family of the missing person such sum or sums of money for family expenses and support from the income of the estate as it may, from time to time, determine. The trustee must, from time to time, when directed by the court, account to and with it for all his acts as trustee, and the court may, at any time, upon good cause shown, remove any trustee, and appoint another in his place.—*Kerr's Cyc. Code Civ. Proc.*, § 1822b.

§ 1043.¹ Unclaimed bank deposits. Twenty years.

All amounts of money heretofore or hereafter deposited with any bank to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest and which shall have remained unclaimed for more than twenty years after the date of such deposit, or withdrawal of any part of principal or interest, and for which no claimant is known or the depositor can not be found, shall, with the increase and proceeds thereof, be deposited with the state treasurer in the same manner and subject to the same distribution as provided for in section one thousand two hundred and thirty-four of the Code of Civil Procedure. The president or managing officer of every bank must, within fifteen days after the first day of January of every year, return to the superintendent of banks a sworn statement showing the names of depositors known to be dead, or who have not made further deposits, or withdrawn any moneys during the preceding twenty years and at the same time it shall be the duty of the president or managing officer of every bank to furnish to the state controller a list of the names of all depositors to whom said moneys belong or to whom said bank owes the same.

STATEMENT TO CONTROLLER.—Such statement shall show in detail the following matters, viz.: 1. The name and last known place of residence or post-office address of the

person making such deposit. 2. The amount, and date of such deposit and whether the same are in moneys or securities, and if the latter, the nature of the same. 3. The interest due on such deposit, if any, and the amount thereof. 4. The sum total of such deposit, together with the interest added thereto due from such bank on account of such deposit or deposits and interest thereon to such depositor, but nothing contained herein shall require any corporation or person renting lock boxes or safes in vaults for storage purposes to open or report concerning property stored therein. Such report itemized as aforesaid shall be signed by the person making the same and shall be sworn to before a person competent to administer oaths as a full, complete, and truthful statement of each of the items therein contained.

DEPOSITS UNCLAIMED FOR TEN YEARS. STATEMENT. NOTICE.—The president or managing officer of every bank must, within fifteen days after the first day of January of every odd numbered year, return to the superintendent of banks a sworn statement showing the names of depositors known to be dead, or who have not made further deposits, or withdrawn any moneys during the preceding ten years. Such statements shall show the amount of account, the depositor's last known place of residence or post-office address, and the fact of death, if known to such president or managing officer. Such president or managing officer must give notice of these deposits in one or more newspapers published in or nearest to the town or city where such bank has its principal place of business, at least once a week for four consecutive weeks, the cost of such publication to be paid pro rata out of such unclaimed deposits. This section does not apply to any deposit made by or in the name of a person known to the president or managing officer to be living, or which, with the accumulation thereon, is less than fifty dollars. The superintendent of banks must

incorporate in his subsequent report such returns made to him as provided in this section.

PENALTY.—If any president or managing officer of any bank neglects or refuses to make the sworn statement required by this section such bank shall forfeit to the state of California the sum of one hundred dollars a day for each day such default shall continue. Any president or managing officer of any bank who violates any of the provisions of this section shall forfeit to the state of California the sum of one hundred dollars a day for each and every day such violation shall continue. For the purposes of this section all deposits received by any bank under the provisions of section thirty-one, or section thirty-one a, of this act shall be deemed to have been deposited with such bank at the time the deposit was made with the bank from which the deposit was transferred; provided, that any bank which shall make any deposit with the state treasurer in conformity with the provisions of this section shall not thereafter be liable to any person for the same and any action which may be brought by any person against any bank for moneys so deposited with the state treasurer shall be defended by the attorney-general without cost to such bank.—*Cal. Stats. 1913, ch. 104, p. 137, sec. 20 of the "Bank Act," as amended.*

ESTATES OF MISSING PERSONS.

1. Invalidity of statute.
2. Presumption of death.

ESTATES OF MISSING PERSONS.

1. **Invalidity of statute.**—The statute of North Dakota, providing for the appointment of a special administrator in cases where "the death of the person whose estate is in question is not satisfactorily proved, but he is shown to have disappeared under circumstances which afford reasonable grounds to believe either that he is dead or has been secreted, confined, or otherwise unlawfully done away with," is invalid, as depriving the person of his property and its possession without notice or due process of law, when applied to the property of a person living.—*Clapp v. Houg*, 12 N. D. 600. 102 Am. St. Rep. 589, 65 L. R. A. 757, 98 N. W. 710. In this case, the trial court found that the order

of the county court, appointing a special administrator of Houg's estate was null and void, for the reason that said Houg was not dead, but a living person, and denied the administrator's application for costs and necessary disbursements and expenses incurred while acting as such special administrator. The administrator appealed from a judgment entered on such finding. He contended that the statute, under which the appointment was made, did not contemplate a general administration of the estate, but simply the taking of possession of the estate of the absentee until his return, or until satisfactory proof of his death was received, and a general administrator appointed. The appellate court did not determine whether the statute was applicable to the estates of dead, or of living, persons, or both, nor whether the statute was unconstitutional, as conferring powers on the probate court, in respect to preserving the property of absentees, not vested in it by the constitution. But it did reach the conclusion that the law, so far as it affected the property of living persons, contravened the provision of the fourteenth amendment of the federal constitution. "The absence of notice," said Morgan, J., in rendering the opinion of the court, "renders the proceedings void, and the statute is of no validity, as against the property of a living person, because it does not provide for notice to him. In no case, under state procedure, is the mere taking of possession of property equivalent to notice of action to be taken in reference to such property." The taking of the possession of the property of such person, under letters of administration issued without notice, is not such notice to the owner as will validate the proceedings; and all costs, incurred by such administrator, and disbursements made by him, though acting in good faith, are not a legal charge against such person or his property, as the proceedings are wholly void.—*Clapp v. Houg*, 12 N. D. 600, 102 Am. St. Rep. 589, 65 L. R. A. 757, 98 N. W. 710, 712. The statute of Rhode Island at one time provided, that "if any person shall be absent from this state for the term of three years, without proof of his being alive, administration may be granted upon such person's estate as if he were dead." Letters of administration on an absentee's estate were granted, under this statute, after he had been absent about ten years. The letters, on their face, did not purport to be letters of administration on the estate of a deceased person. The statute did not require anything further to be shown than that the absentee had left the state and remained away for three years. The absentee had deposited money with a bank, and, after the letters of administration were issued, the bank paid the money over to the administrator appointed. The absentee afterwards appeared and demanded the amount of his deposit from the bank. This demand was met by a reply that the bank had paid the money to the administrator. The depositor then sued the bank to recover the money. It was held that the effect of such administration was to deprive the plaintiff of his property without due process of law. The doctrine of equitable estoppel, it was said, could not be applied to such a case, because all persons

dealing with a person holding letters of administration, in a case like this, must be held to know that the proof of death rests wholly on evidence not inconsistent with the fact of life, and that therefore, if the person is alive, the judgment of the probate court that he is dead can not be conclusive against him. There is, it seems, no element of an estoppel in pais, in such a case, because there is no deception or false representation of any fact. The party deals with the matter knowing that the supposed decedent may be alive. He knows that he takes or deals with his property subject to that risk. The state may make a law for taking care of abandoned estates, with proper provisions for notice to absent or unknown heirs, and it is within the power of the state to provide all proper safeguards for the protection of innocent persons who have been led into mistake, to their injury, by the action of the probate court, or otherwise; but this laudable and proper legislation ought to stop where it will operate to deprive another innocent person of his property for their benefit. "There are some misfortunes that even the most innocent can not be protected against by the power of the state. Such is the case of persons who are innocently misled into the belief that void judgments are valid, as in the case of a suit the belief that void judgments are valid, as in the case of a suit carried on against a person supposed to be alive, but in reality dead."—*Lavin v. Emigrant Ind. Sav. Bank*, 1 Fed. 641, 642, 675, 18 Blatchf. 1, per Choate, J.

REFERENCES.

Various state statutes relative to the administration of the estates of absent persons.—See 1 Woerner's American Law of Administration, § 212. Constitutionality of statutes providing for the administration of the estate of an absentee.—See note 4 L. R. A. (N. S.) 944, 945.

2. *Presumption of death.*—Absence of a person from his place of residence for seven years or more, within that time nothing having been heard of, or from him by anybody who naturally would hear from him in case of his living, raises a presumption that he is dead, provided that circumstances are not such as to account for his not having been heard from, and that diligent inquiry has been made for him.—*New York Life Ins. Co. v. Holck*, 59 Colo. 416, 151 Pac. 916. Before the presumption of death can arise, with reference to the unexplained absence of a person for seven years, there must be a lack of information concerning such person on the part of those likely to hear from him, after diligent inquiry extended to all places where information is likely to be obtained.—*Thompson v. Millikin*, 93 Kan. 72, 76, 143 Pac. 430. The unexplained absence of a woman's husband for seven years raises a presumption that he is dead, but it is not conclusive evidence; it is merely prima facie evidence and may be negatived by proof that the man still lives.—*Thompson v. Millikin*, 93 Kan. 72, 76, 143 Pac. 430.

PART XIX.

INHERITANCE TAXES.

CHAPTER I.

INHERITANCE TAXES.

- § 1043.2 Inheritance tax act of California, 1917.
- § 1044. Form. Petition for appointment of appraiser where value of property subject to tax is uncertain.
- § 1045. Form. Inheritance tax petition. (Colorado.)
- § 1046. Form. Order appointing appraiser of property subject to.
- § 1046.1 Form. Order appointing appraisers, including the inheritance tax appraiser. (California.)
- § 1046.2 Form. Order appointing inheritance tax appraiser as sole appraiser of estate. (California.)
- § 1047. Form. Order appointing appraiser. (Colorado.)
- § 1048. Form. Warrant to appraiser. (Colorado.)
- § 1049. Form. Notice of time and place of appraisement.
- § 1050. Form. Report of appraiser of tax. (Colorado.)
- § 1050.1 Form. Report of inheritance tax appraiser. (California.)
- § 1051. Form. Order approving report of appraiser and fixing amount of tax. (Colorado.)
- § 1052. Form. Order fixing tax.
- § 1052.1 Form. Order fixing inheritance tax. (California.)
- § 1053. Form. Notice to county treasurer of intended delivery of securities subject to tax.
- § 1054. Form. Treasurer's notice to district attorney that tax is unpaid.
- § 1055. Form. Petition for citation to show cause why tax should not be paid.
- § 1056. Form. Order that citation issue to show cause why tax should not be paid.
- § 1057. Form. Citation to show cause why tax should not be paid.
- § 1058. Form. Bond of beneficiary to state.
- § 1059. Form. Bond of executor or administrator.
- § 1060. Form. Table of exemptions and percentages.
- § 1060.1 Form. Return for estate tax, under federal law.
- § 1060.2 Form. Thirty-day notice to be given by executor or administrator, under federal law.

INHERITANCE TAXES.

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2. Nature of tax.
3. Power to impose.
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 - (1) In general.
 - (2) Due process of law.
 - (3) Uniformity of taxation.
 - (4) Same. Discrimination.
 - (5) Title of act.
 - (6) Revision of act or amendment of section.
5. Construction of acts.
 - (1) In general.
 - (2) Inheritance and taxes. Distinction.
 - (3) Reciprocal statutes.
 - (4) Double taxation.
6. Property subject to tax.
 - (1) In general.
 - (2) Property of non-residents.
 - (3) Conveyances.
 - (4) Same. In contemplation of death.
 - (5) Community property.
 - (6) Homesteads.
 - (7) Joint tenancy.
 - (8) Exemptions.
7. Discrimination.
 - (1) In general.
 - (2) Treaty. Non-resident alien heirs.
8. What law governs.
9. Value of property and amount of tax.
 - (1) In general.
 - (2) Appraisalment.
 - (3) Assessment of corporate stock.
 - (4) Residuary estates.
10. Liability for tax.
 - (1) Tax is chargeable to whom.
 - (2) Instances of liability.
 - (3) Computation of primary rates. Exemption.
 - (4) Payment. Interest. Bond for payment.
11. Practice. Collection. State controller.
 - (1) Right of state.
 - (2) Practice. Collection. Commission.
 - (3) Final account to show payment of tax.
 - (4) Power and duty of state controller.
12. Actions.
 - (1) In general.
 - (2) Defenses.
 - (3) Pleading and evidence.
 - (4) Question of fact.
 - (5) Laches and limitations.
 - (6) Conclusiveness of judgment.
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§ 1043.² Inheritance tax act of California, 1917.

TITLE.² SEC. 1.—(1) This act shall be known as the “inheritance tax act.”

DEFINITIONS. “ESTATE AND PROPERTY.” WIFE’S SHARE OF COMMUNITY PROPERTY EXEMPTED. — (2) The words “estate” and “property” as used in this act shall be taken to mean the real and personal property or interest therein of the testator, intestate, grantor, bargainor, vendor, or donor passing or transferred to individual legatees, devisees, heir, next of kin, grantees, donees, vendees, or successors, and shall include all personal property within or without the state; provided, that for the purpose of this act the one-half of the community property which goes to the surviving wife on the death of the husband, under the provisions of section one thousand four

hundred and two of the Civil Code, shall not be deemed to pass to her as heir to her husband, but shall, for the purpose of this act, be deemed to go, pass, or be transferred to her for valuable and adequate consideration and her said one-half of the community shall not be subject to the provisions of this act; provided, further, that in case of a transfer of community property from the husband to the wife, within the meaning of subdivision (3) or (5) of section two of this act, one-half of the community property so transferred shall not be subject to the provisions of this act; and provided, further, that the presumption that property acquired by either husband or wife after marriage is community property, shall not obtain for the purpose of this act as against any claim by the state for the tax hereby imposed; but the burden of proving such property to be community property shall rest upon the person claiming the same to be community property.

TRANSFER.—(3) The word “transfer” as used in this act shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift, or appointment in the manner herein described.

DECEDENT.—(4) The word “decedent” as used in this act shall include the testator, intestate, grantor, bargainor, vendor, or donor.

COUNTY TREASURER AND INHERITANCE TAX APPRAISER.—

(5) The words “county treasurer” and “inheritance tax appraiser,” as used in this act, shall be taken to mean the treasurer or the inheritance tax appraiser of the county of the superior court having jurisdiction as provided in section fifteen of this act.

TAX ON TRANSFER OF PROPERTY, WHEN.—**SEC. 2.**—A tax shall be and is hereby imposed upon the transfer of any property, real, personal, or mixed, or of any interest

therein or income therefrom in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted, to be paid to the treasurer of the proper county, as hereinafter directed, for the use of the state, said taxes to be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted, in the following cases:

(1) When the transfer is by will or by the intestate or homestead laws of this state, from any person dying seised or possessed of the property while a resident of the state, or by any order of court setting apart property pursuant to article one, chapter five, title eleven, part three of the Code of Civil Procedure.

(2) When the transfer is by will or intestate laws of property within this state and the decedent was a non-resident of the state at the time of his death, or by any order of court setting apart property pursuant to article one, chapter five, title eleven, part three of the Code of Civil Procedure.

(3) When the transfer is of property made by a resident, or by a non-resident when such non-resident's property is within this state, by deed, grant, bargain, sale, assignment, or gift, made without valuable and adequate consideration (*i. e.*, a consideration equal in money or in money's worth to the full value of the property transferred):

(a) In contemplation of the death of the grantor, vendor, assignor, or donor, or,

(b) Intended to take effect in possession or enjoyment at or after such death.

When such person, institution, or corporation becomes beneficially entitled in possession or expectancy to any property or the income therefrom, by any such transfer, whether made before or after the passage of this act.

CONTEMPLATION OF DEATH.—(4) The words “contem-

plation of death," as used in this act, shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in nowise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person making a gift *causa mortis*; and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of property transferred by testate or intestate laws.

PROPERTY HELD IN JOINT NAMES.—(5) Whenever property, real or personal, is held in the joint names of two or more persons, or is deposited in banks or other institutions or depositories in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons, the right of the surviving joint tenant or joint tenants, person or persons to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this act in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased joint tenant or joint depositor and had been devised or bequeathed to the surviving joint tenant or joint tenants, person or persons, by such deceased joint tenant or joint depositor by will, excepting therefrom such part thereof as may be proved by the surviving joint tenant or joint tenants to have originally belonged to him or them and never to have belonged to the decedent.

APPOINTMENT DEEMED TRANSFER.—(6) Whenever any person, trustee, or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment, when made, shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had

been bequeathed or devised by such donee by will; and whenever any person, trustee, or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons, trustees, or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

BEQUEST EXCEEDING REASONABLE COMPENSATION.—(7) Whenever a decedent appoints or names one or more executors or trustees, and makes a bequest or devise of property to them in lieu of commissions or allowances, which otherwise would be liable to said tax, or appoints them his residuary legatees, and said bequest, devise, or residuary legacies exceeds what would be a reasonable compensation for their services, such excess over and above the exemptions herein provided for shall be liable to said tax; and the superior court in which the probate proceedings are pending shall fix the compensation.

PROPERTY TRANSFERRED SUBJECT TO CHARGE DETERMINED BY DEATH OF PERSON.—(8) Where any property shall, after the passage of this act, be transferred subject to any charge, estate, or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate, or interest, shall be deemed a transfer of property taxable under the provisions of this act in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase

from the person from whom the title to their respective estates or interests is derived.

AGGREGATE VALUE OF MORE THAN ONE TRANSFER.—(9) When more than one transfer within the meaning of any of the preceding subdivisions of this section has been made, either before or after the passage of this act, by a decedent to one person, the tax shall be imposed upon the aggregate market value of all of the property so transferred to such person in the same manner and to the same extent as if all of the property so transferred were actually transferred by one transfer.

NO DEDUCTION OF UNITED STATES TAX.—(10) In determining the market value of the property transferred, no deduction shall be made for any inheritance tax or estate tax paid to the government of the United States.

LIEN. SUIT WITHIN FIVE YEARS.—SEC. 3.—Such taxes shall be and remain a lien upon the property passed or transferred until paid; provided, that said lien shall be limited to the property chargeable therewith, and the person to whom the property passes or is transferred, and all administrators, executors, and trustees of every estate so transferred or passed, shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. The provisions of the Code of Civil Procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine, or enforce the collection of any tax or penalty prescribed by this article, and this section shall be construed as having been in effect as of date of the original enactment of the inheritance tax law; provided, that unless sued for within five years after they are due and legally demandable, such taxes, or any taxes accruing under any act herein repealed, shall cease to be a lien as against any bona fide purchaser of said property; and, provided, that

no such lien shall cease within two years from the date of the passage of this act.

TAX WHEN PROPERTY VALUE NOT OVER \$25,000.—SEC. 4.—When the property or any beneficial interest therein so passed or transferred exceeds in value the exemption hereinafter specified and shall not exceed in value twenty-five thousand dollars, the tax hereby imposed shall be:

(1) Where the person or persons entitled to any beneficial interest in such property shall be the husband, wife, lineal ancestor, lineal issue of the decedent, or any child adopted as such in conformity with the laws of this state, or any child to whom such decedent for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent (provided, however, such relationship began at or before the child's fifteenth birthday, and was continuous for said ten years thereafter), or any lineal issue of such adopted or mutually acknowledged child, at the rate of one per centum of the clear value of such interest in such property.

(2) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or a descendant of a brother or sister of a decedent; a wife or widow of a son, or the husband of a daughter of the decedent at the rate of three per centum of the clear value of such interest in such property.

(3) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother of the decedent, at the rate of four per centum of the clear value of such interest in such property.

(4) Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated or shall be a stranger in blood to the decedent, or shall be a body politic or corporate, at the rate of five

per centum of the clear value of such interest in such property.

TAX WHEN PROPERTY VALUE EXCEEDS \$25,000.—SEC. 5.—

(1) When the market value of such property or interest passed or transferred to any of the persons mentioned in subdivision one of section four exceeds twenty-five thousand dollars, the rates of tax upon such excess shall be as follows:

(a) Upon all in excess of twenty-five thousand dollars and up to fifty thousand dollars, two per centum of such excess.

(b) Upon all in excess of fifty thousand dollars and up to one hundred thousand dollars, four per centum of such excess.

(c) Upon all in excess of one hundred thousand dollars and up to two hundred thousand dollars, seven per centum of such excess.

(d) Upon all in excess of two hundred thousand dollars and up to five hundred thousand dollars, ten per centum of such excess.

(e) Upon all in excess of five hundred thousand dollars and up to one million dollars, twelve per centum of such excess.

(f) Upon all in excess of one million dollars, fifteen per centum of such excess.

(2) When the market value of such property or interest passed or transferred to any of the persons mentioned in subdivision two of section four exceeds twenty-five thousand dollars, the rates of tax upon such excess shall be as follows:

(a) Upon all in excess of twenty-five thousand dollars and up to fifty thousand dollars, six per centum of such excess.

(b) Upon all in excess of fifty thousand dollars and up to one hundred thousand dollars, nine per centum of such excess.

(c) Upon all in excess of one hundred thousand dollars and up to two hundred thousand dollars, twelve per centum of such excess.

(d) Upon all in excess of two hundred thousand dollars and up to five hundred thousand dollars, fifteen per centum of such excess.

(e) Upon all in excess of five hundred thousand dollars and up to one million dollars, twenty per centum of such excess.

(f) Upon all in excess of one million dollars, twenty-five per centum of such excess.

(3) When the market value of such property or interest passed or transferred to any of the persons mentioned in subdivision three of section four exceeds twenty-five thousand dollars, the rates of tax upon such excess shall be as follows:

(a) Upon all in excess of twenty-five thousand dollars and up to fifty thousand dollars, eight per centum of such excess.

(b) Upon all in excess of fifty thousand dollars and up to one hundred thousand dollars, ten per centum of such excess.

(c) Upon all in excess of five hundred thousand dollars and up to two hundred thousand dollars, fifteen per centum of such excess.

(d) Upon all in excess of two hundred thousand dollars and up to five hundred thousand dollars, twenty per centum of such excess.

(e) Upon all in excess of five hundred thousand dollars and up to one million dollars, twenty-five per centum of such excess.

(f) Upon all in excess of one million dollars, thirty per centum of such excess.

(4) When the market value of such property or interest passed or transferred to any of the persons mentioned in subdivision four of section four exceeds twenty-

five thousand dollars, the rates of tax upon such excess shall be as follows:

(a) Upon all in excess of twenty-five thousand dollars and up to fifty thousand dollars, ten per centum of such excess.

(b) Upon all in excess of fifty thousand dollars and up to one hundred thousand dollars, fifteen per centum of such excess.

(c) Upon all in excess of one hundred thousand dollars and up to two hundred thousand dollars, twenty per centum of such excess.

(d) Upon all in excess of two hundred thousand dollars and up to five hundred thousand dollars, twenty-five per centum of such excess.

(e) Upon all in excess of five hundred thousand dollars, thirty per centum of such excess.

EXEMPTIONS ALLOWED.—SEC. 6.—The following exemptions from the tax are hereby allowed:

(1) All property transferred to societies, corporations, and institutions now or hereafter exempted by law from taxation, or to any public corporation, or to any society, corporation, institution, or association of persons engaged in or devoted to any charitable, benevolent, educational, public, or other like work (pecuniary profit not being its object or purpose), or to any person, society, corporation, institution, or association of persons in trust for or to be devoted to any charitable, benevolent, educational, or public purpose, by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy, to any such property or to the income thereof, shall be exempt; provided, however, that such society, corporation, institution, or association be organized or existing under the laws of this state or that the property transferred be limited for use within this state.

(2) Property of the clear value of twenty-four thou-

sand dollars, transferred to the widow or to a minor child of the decedent, and of ten thousand dollars transferred to each of the other persons described in the first subdivision of section four, shall be exempt.

(3) Property of the clear value of two thousand dollars, transferred to each of the persons described in the second subdivision of section four, shall be exempt.

(4) Property of the clear value of one thousand dollars, transferred to each of the persons described in the third subdivision of section four, shall be exempt.

(5) Property of the clear value of five hundred dollars, transferred to each of the persons and corporations described in the fourth subdivision of section four, shall be exempt.

TIME OF PAYMENT. DISCOUNT. BOND.—SEC. 7.—(1) All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and if the same are paid within eighteen months, no interest shall be charged and collected thereon, but if not so paid, interest at the rate of ten per centum per annum shall be charged and collected from the time said tax accrued; provided, that if said tax is paid within six months from the accruing thereof a discount of five per centum shall be allowed and deducted from said tax. And in all cases where the executors, administrators, or trustees do not pay such tax within eighteen months from the death of the decedent, they shall be required to give a bond for the payment of said tax, together with interest.

IF ESTATE NOT SETTLED WITHIN EIGHTEEN MONTHS.—

(2) The penalty of ten per cent per annum imposed by subdivision (1) of this section for the non-payment of said tax, shall not be charged in cases where, in the judgment of the court, by reason of claims made upon the estate necessary litigation, or other unavoidable cause of delay, the estate of any decedent, or a part thereof, can not be settled at the end of eighteen months from the

death of the decedent; but in such cases seven per cent per annum shall be charged upon the said tax from the expiration of said eighteen months until the cause of such delay is removed, after which ten per cent interest per annum shall again be charged until the tax is paid; but litigation to defeat the payment of the tax shall not be considered necessary litigation.

IMMEDIATE APPRAISEMENT AND PAYMENT.—SEC. 8.—(1) When any grant, gift, legacy, devise, or succession upon which a tax is imposed by section two of this act shall be an estate, income, or interest for a term of years, or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion, or other expectancy, real or personal, the entire property or fund by which such estate, income, or interest is supported, or of which it is a part, shall be appraised immediately after the death of the decedent, and the market value thereof determined, in the manner provided in section sixteen or seventeen of this act, and the tax prescribed by this act shall be immediately due and payable to the treasurer of the proper county, and, together with the interest thereon, shall be and remain a lien on said property until the same is paid.

INCUMBRANCES.—(2) In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated, or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat, or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person prop-

erly entitled thereto of a proportionate amount of such tax on account of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section eleven hereof upon order of the court having jurisdiction.

PROPERTY TRANSFERRED IN TRUST. BOND. RETURN OF PROPERTY FILED. RECOVERY ON BOND IF SECURITY NOT RENEWED.—(3) When property is transferred in trust or otherwise, and the rights, interest, or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this act, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this act, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this act; such return of overpayment shall be made in the manner provided by section eleven of this act, upon order of the court having jurisdiction; provided, that the person or persons or body politic or corporate beneficially interested in the property chargeable with said tax or the trustees thereof may elect not to pay the same until such person or persons, or body politic or cor-

porate beneficially interested in such property shall come into the actual possession or enjoyment thereof, and in that case such person or persons or body politic or corporate or trustees shall execute a bond to the people of the state of California in a penalty of twice the amount of said tax with such sureties as the said superior court may approve, conditioned for the payment of said tax and interest thereon at the rate of seven per cent per annum commencing at the expiration of eighteen months from the death of the decedent at such time or period as they or their representatives may come into the actual possession or enjoyment of such property, and conditioned further, that if said bond be not renewed and the returns made as herein provided, the amount of said tax and interest thereon shall immediately become due and payable. Said bond shall be filed in the office of the county clerk of the proper county and a certified copy thereof shall be immediately transmitted to the state controller; provided, further, that such person or persons or body politic or corporate, or trustees, shall enter into such security within a period of ninety days after the entry of the order or decree fixing the inheritance tax charged against such transfer, or within such period thereafter as the court may in its discretion permit, and shall make a full and verified return of such property to said court and file the same in the office of the county clerk within one year from the date of such order or decree fixing tax, and at such times thereafter as the court on the application of the state controller may require, and renew such security every five years after the date of the approval thereof. Upon the approval of said bond as herein provided, said tax shall cease to be a lien upon the property so transferred. If such security shall not be renewed before the expiration of each five-year period, said bond shall immediately become due and payable and if the same be not paid forthwith, the attorney-general

shall file an action in the name of the people of the state on the relation of the controller, to recover the same and the penalties thereunder and no demand for payment shall be necessary before the institution of such suit.

NEW UNDERTAKING.—Whenever it shall be made to appear to the satisfaction of the court that any surety on such bond or undertaking has for any reason become insufficient, the court may on motion of the state controller, after such notice to such person or persons, body politic or corporate, or trustees as the court may require, order the giving of a new undertaking with sufficient sureties in lieu of such insufficient undertaking. In case such new undertaking so required shall not be given within the time required by such order, or in case the sureties thereon fail to justify thereon when required, all rights obtained by the filing of such original undertaking, or subsequent undertaking, shall cease and the amount of said tax and interest thereon shall immediately become due and payable.

ESTATES IN EXPECTANCY.—(4) Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.

TAXATION OF ESTATE THAT CAN BE DEVESTED.—(5) Where an estate or interest can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting.

FUTURE OR CONTINGENT ESTATE. DETERMINATION OF VALUE.—(6) The value of every future, or contingent or limited estate, income or interest, shall, for the purposes

of this act be determined by the rule, methods, and standards of mortality and of value that are set forth in the actuaries' combined experience tables of mortality for ascertaining the value of policies of life insurance and annuities and for the determination of the liabilities of life insurance companies, save that the rate of interest to be assessed in computing the present value of all future interest and contingencies shall be five (5) per cent per annum. The insurance commissioner shall without a fee on the application of any superior court or of any inheritance tax appraiser determine the value of any future or contingent estate, income or interest therein limited, contingent, dependent, or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's application or other facts to him submitted by said appraiser or said court and certify the same in duplicate to such court or appraiser, and his certificate thereof shall be conclusive evidence that the method of computation therein is correct. When an annuity or a life estate is terminated by the death of the annuitant or life tenant, and the tax upon such interest has not been fixed and determined, the value of said interest for the purpose of taxation under this act shall be the amount of the annuity or income actually paid or payable to the annuitant or life tenant during the period for which such annuitant or life tenant was entitled to the annuity or was in possession of the life estate.

COLLECTION OF TAX BY ADMINISTRATOR.—SEC. 9.—(1) Any administrator, executor, or trustee having in charge or trust any legacy or property for distribution, subject to the said tax, shall deduct the tax therefrom, or if the legacy or property be not money he shall collect the tax thereon, upon the market value thereof, from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have

collected the tax thereon; and whenever any such legacy shall be charged upon or payable out of real estate, the executor, administrator, or trustee shall collect said tax from the distributee thereof, and the same shall remain a charge on such real estate until paid; if, however, such legacy be given in money to any person for a limited period, the executor, administrator, or trustee shall retain the tax upon the whole amount; but if it be not in money he shall make application to the superior court to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

SALE OF PROPERTY TO PAY TAX.—(2) All executors, administrators, and trustees shall have full power to sell so much of the property of the decedent as will enable them to pay said tax, in the same manner as they may be enabled by law to do for the payment of debts of the estate, and the amount of said tax shall be paid as hereinafter directed.

PAYMENT WITHIN THIRTY DAYS.—(3) Every sum of money retained by an executor, administrator, or trustee, or paid into his hands, for any tax on property, shall be paid by him, within thirty days thereafter, to the treasurer of the county in which the probate proceedings are pending.

TREASURER'S RECEIPT.—SEC. 10.—Upon the payment to any county treasurer of any tax due under this act, such treasurer shall issue a receipt therefor, in triplicate, one copy of which he shall deliver to the person paying said tax, and the original and one copy thereof he shall immediately send to the controller of state, whose duty it shall be to charge the treasurer so receiving the tax with the amount thereof, and said controller shall retain one of said receipts and the other he shall countersign and seal with the seal of his office, and immediately transmit

to the clerk of the court fixing such tax. And an executor, administrator, or trustee shall not be entitled to credits in his accounts, nor be discharged from liability for such tax, nor shall said estate be distributed, unless a receipt so sealed and countersigned by the controller, or a copy thereof, certified by him, shall have been filed with the court. Any person shall, upon payment to the county treasurer of the sum of fifty cents, be entitled to a duplicate, or copy, of any receipt that may have been given by said treasurer for the payment of any tax under this act.

REFUND OF TAX.—SEC 11.—(1) If any debts shall be proved against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the superior court having jurisdiction, on notice to the state controller, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator, or trustee, if the tax has not been paid to the county treasurer; or if such tax has been paid to such county treasurer, such officer shall refund out of any inheritance tax moneys in his hands or custody such equitable proportion of the tax, and credit himself with the same in the account required to be rendered by him under this act.

ASSESSING TAX ON AMOUNT WRONGFULLY DEDUCTED.—(2) Where it shall be proved to the satisfaction of the superior court that deductions for debts were allowed upon the appraisal, since proved to have been erroneously allowed, it shall be lawful for such superior court to enter an order assessing the tax upon the amount wrongfully or erroneously deducted.

REFUND OF TAX WHEN ORDER MODIFIED OR REVERSED. APPLICATION WITHIN ONE YEAR.—(3) If, after the payment

of any tax in pursuance of an order fixing such tax, made by the superior court having jurisdiction, such order be modified or reversed by the superior court having jurisdiction within two years from and after the date of entry of the order fixing the tax, or be modified or reversed at any time on an appeal taken therefrom within the time allowed by law on due notice to the state controller, the county treasurer shall refund to the executor, administrator, trustee, person or persons by whom such tax was paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of tax fixed by the order modified or reversed, out of any inheritance tax moneys in his hands or custody, and credit himself with the same in the account required to be rendered by him to the controller on his semi-annual settlement; but no application for such refund shall be made after one year from such reversal or modification, unless an appeal shall be taken therefrom, in which case no such application shall be made after one year from the final determination on such appeal or of an appeal taken therefrom, and the representatives of the estate, legatees, devisees, or distributees entitled to any refund under this section shall not be entitled to any interest upon such refund, and the state controller shall deduct from the fees allowed by this act to the county treasurer the amount theretofore allowed him upon such overpayment.

REFUND OF TAX ERRONEOUSLY PAID.—(4) When any amount of said tax shall have been erroneously paid, the superior court having jurisdiction, on application after notice to the state controller, and on satisfactory proof to it, shall by order require the county treasurer to refund and pay to the executor, administrator, trustee, person, or persons who had paid any such tax in error the amount of such tax so erroneously paid; provided, that all applications for such repayment of such tax so

erroneously paid shall be made within one year of the date of the entry of the order fixing tax or of the decree of final distribution of the estate. Such refund shall be made by said treasurer out of any inheritance tax moneys in his hands or custody and he shall credit himself with the same in the account required to be rendered by him to the controller on semi-annual settlement; and the state controller shall deduct from the fees allowed by this act to the county treasurer the amount theretofore allowed him upon such erroneous payment.

APPLICATION OF SECTION AS AMENDED.—(5) This section, as amended, shall apply to appeals and proceedings now pending and taxes heretofore paid in relation to which the period of one year from such reversal or modification has not expired when this section, as amended, takes effect.

EXAMINATION OF BOOKS, ETC. PENALTY FOR DIVULGING INFORMATION.—SEC. 12—(1) Whenever the state controller shall have reasonable cause to believe that a tax is due under the provisions of this act, upon any transfer of any property, and that any person, firm, institution, company, association, or corporation has possession, custody, or control of any books, accounts, papers, or documents relating to or evidencing such transfer, the state controller or inheritance tax attorney, or any assistant inheritance tax attorney of the inheritance tax department, is hereby authorized and empowered to inspect the books, records, accounts, papers, and documents of any such person, firm, institution, company, association, or corporation, including the stock transfer book of any corporation, for the purpose of acquiring any information deemed necessary or desirable by said state controller or such inheritance tax attorney or assistant inheritance tax attorneys, for the proper enforcement of this act, and for the collection of the full amount of tax which may be due the state hereunder. Any and all in-

formation acquired by said state controller or said inheritance tax attorney or assistant inheritance tax attorneys shall be deemed and held by said state controller and said inheritance tax attorney and assistant inheritance tax attorneys and each of them, as confidential, and shall not be divulged, disclosed, or made known by them or any of them except in so far as may be necessary for the enforcement of the provisions of this act. Any controller or ex-controller, or inheritance tax attorney or ex-inheritance tax attorney, or assistant inheritance tax attorney or ex-assistant inheritance tax attorney, who shall divulge, disclose, or make known any information acquired by such inspection and examination aforesaid, except in so far as the same may be necessary for the enforcement of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two hundred and fifty dollars nor more than five hundred dollars, or be imprisoned in the county jail for not more than ninety days, or both.

PENALTY FOR REFUSING TO PERMIT EXAMINATION.—(2) Any officer or agent of any firm, institution, company, association, or corporation having or keeping an office within this state, who has in his custody or under his control any book, record, account, paper, or document of such firm, institution, company, association, or corporation, and any person having in his custody or under his control such book, record, account, paper, or document who refuses to give to the state controller, or said inheritance tax attorney, or any of said assistant inheritance tax attorneys, lawfully demanding, as provided in this section, during office hours to inspect or take a copy of the same, or any part thereof, for the purposes hereinabove provided, a reasonable opportunity so to do, shall be liable to a penalty of not less than one thousand dollars nor more than twenty thousand dollars, and in addition thereto shall be liable for the amount of the taxes,

interest, and penalties due under this act on such transfer, and the said penalties and liabilities for the violation of this section may be enforced in an action brought by the state controller in any court of competent jurisdiction.

CONSENT OF CONTROLLER TO TRANSFER OF DECEDENT'S STOCK.—SEC. 13.—(1) No corporation organized or existing under the laws of this state, shall transfer on its books or issue a new certificate for any share or shares of its capital stock belonging to or standing in the name of a decedent or in trust for a decedent or belonging to or standing in the joint names of a decedent and one or more persons, without the written consent of the state controller or person by him in writing authorized to issue such consent.

TRUST COMPANIES, ETC., TO RETAIN AMOUNT TO PAY TAX. NOTICE OF TRANSFER.—(2) No safe deposit company, trust company, corporation, bank, or other institution, person or persons having in possession or under control or custody or under partial control or partial custody securities, deposits, assets, or property belonging to or standing in the name of a decedent who was a resident or non-resident, or belonging to, or standing in the joint names of such a decedent and one or more persons, including the shares of the capital stock of, or other interest in, the safe deposit company, trust company, corporation, bank, or other institution making the delivery or transfer herein provided, shall deliver or transfer the same to the executors, administrators, or legal representatives, agents, deputies, attorneys, trustees, legatees, heirs, successors in interest of said decedent, or to any other person or persons, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, or upon their order or request, without retaining a sufficient portion or amount thereof to pay any tax and interest which may thereafter be assessed thereon

under this act and unless notice of the time and place of such delivery or transfer be served upon the state controller and county treasurer at least ten days prior to said delivery or transfer; provided, that the state controller, or person by him in writing authorized so to do, may consent in writing to said delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank, or other institution, person or persons from the obligation hereunder to give such notice or to retain any portion of said securities, deposits, or other assets in their possession or control. And it shall be lawful for the state controller or county treasurer, personally or by representatives, to examine said securities, deposits, or assets at the time of said delivery or otherwise.

PENALTY FOR FAILURE TO COMPLY.—(3) Failure to comply with the provisions of this section shall render such safe deposit company, trust company, corporation, bank, or other institution, person or persons, liable to a penalty of not more than twenty thousand dollars, and in addition thereto said safe deposit company, trust company, corporation, bank, or other institution, person or persons shall be liable for the amount of the taxes, interest, and penalties due under this act on said securities, deposits, or other assets above mentioned, and said penalties and liabilities of said safe deposit company, corporation, bank, or other institution, person or persons for the violation of this section may be enforced in an action brought by the state controller in any court of competent jurisdiction.

INHERITANCE TAX APPRAISERS.—**SEC. 14.**—The state controller shall appoint, and may at his pleasure remove, one or more persons in each county of the state to act as inheritance tax appraisers therein. Every such inheritance tax appraiser (in addition to any fees paid him as appraiser under section one thousand four hundred and

forty-four of the Code of Civil Procedure) shall be paid for his services out of any inheritance tax moneys in the hands of the treasurer of the county in which he may be acting, a reasonable compensation, to be fixed by the superior court of said county, or a judge thereof, and, together with said compensation, said appraiser shall be allowed his actual and necessary traveling and other incidental expenses, and the fees paid such witnesses as he shall subpoena before him, said expenses and fees to be allowed by said superior court or a judge thereof; provided, that any claim for any such services or expenditure, must before payment, first receive the approval of the state controller; and provided, further, that in any probate proceeding in which the executor or administrator shall have failed to have had the inheritance tax appraiser act as one of the appraisers under section one thousand four hundred and forty-four of the Code of Civil Procedure and to have paid him his fees therefor, the expense of making the inheritance tax appraisement in this act provided for shall be paid out of said estate, and the executor or administrator thereof shall be liable for said fee. Any such appraiser who shall take any fee or reward, other than such as may be allowed him by law, from any executor, administrator, trustee, legatee, next of kin, or heir of any decedent, or from any other person liable to pay said tax, or any portion thereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two hundred and fifty dollars nor more than five hundred dollars, or be imprisoned in the county jail ninety days or both, and in addition thereto the court shall dismiss him from such service.

JURISDICTION OF SUPERIOR COURT.—SEC. 15.—The superior court in the county in which is situate the real property of a decedent, who was not a resident of the state, or if there be no real property, then in the county in which any of the personal property of such non-

resident is situate, or in the county of which the decedent was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act; the court first acquiring jurisdiction hereunder shall retain the same, to the exclusion of every other; provided, that the superior court having acquired jurisdiction in probate of the estate of a decedent shall hear and determine in said probate proceedings all questions in relation to any tax arising under the provisions of this act: (a) Upon property passing in said probate proceedings. (b) Upon any other property transferred, within the meaning of subdivision three of section two or any other provisions of this act, to any person, institution, or corporation taking any property under and by virtue of said probate proceedings.

APPOINTMENT OF INHERITANCE TAX APPRAISERS IN PROBATE PROCEEDINGS. POWERS OF REFEREE. WITNESSES. EVIDENCE. REPORT TO SUPERIOR COURT.—SEC. 16.—(1) When any superior court, having jurisdiction in probate of the estate of any decedent, or a judge of such court, shall, in accordance with section one thousand four hundred and forty-four of the Code of Civil Procedure, appoint the appraiser or appraisers in said section provided for, said superior court or judge thereof shall also at the same time designate and appoint an inheritance tax appraiser (unless such designation and appointment be previously made) to ascertain and report to said superior court the amount of inheritance tax due upon any property passing in said probate proceeding, or a lien thereon, or upon any other property transferred within the meaning of subdivision (3) of section two of this act, or under any other provision of this act, to any person, institution, or corporation taking property under and by virtue of said probate proceedings, together with such other or additional information as shall assist said court in the deter-

mination of said tax. Thereupon said inheritance tax appraiser shall have all the powers of a referee of said superior court, and shall have jurisdiction to require the attendance before him of the executor or administrator of said estate, or any person interested therein, or any other person whom he may have reason to believe possesses knowledge of the estate of said decedent, or knowledge of any property transferred by said decedent within the meaning of this act, or knowledge of any facts that will aid said appraiser or the court in the determination of said tax. For the purpose of compelling the attendance of such person or persons before him, and for the purpose of appraising any property or interest subject to, or liable for any inheritance tax hereunder, and for the purpose of determining the amount of tax due thereon, the said inheritance tax appraiser is hereby authorized to issue subpoenas compelling the attendance of witnesses before him. Any person or persons who shall be served with a subpoena, issued by said inheritance tax appraiser, to appear and testify or to produce books and papers, and who shall refuse and neglect to appear and testify or to produce books and papers relevant to such appraisement, as commanded in such subpoena, shall be guilty of a contempt of court. And he may examine and take the evidence of such witnesses or of such executor or administrator, or other person under oath concerning such property and the value thereof, and concerning the property or the estate of such decedent subject to probate, and concerning any transfer made by such decedent within the meaning of this act. Upon the completion of his inheritance tax appraisement in any probate proceeding, the inheritance tax appraiser shall make a report in writing to the superior court of the clear market value of the several interests in the estate of the decedent, and shall report the amount of inheritance or transfer tax chargeable against, or a lien upon such interests,

acquired by virtue of said probate proceedings or by any transfer within the meaning of this act, to any person, institution, or corporation acquiring any property by virtue of said probate proceedings together with such other facts as may advise the court in regard thereto, or which the court may require, and may return to said superior court such depositions as he may have had reduced to writing, exhibits, or other testimony or information taken before him, or submitted to him.

NOTICE OF FILING REPORT. ORDER CONFIRMING REPORT. HEARING OBJECTIONS.—(2) Upon the filing of said report said appraiser shall mail a copy thereof to the state controller and the clerk of said superior court shall on said day or the next succeeding judicial day give notice of such filing to all persons interested in such proceedings by causing notices to be posted in at least three public places in the county, one of which must be the place where the court is held, and in addition thereto shall mail to the state controller and to all persons chargeable with any tax in said report who have appeared in such proceeding, a copy of said notice. At any time after the expiration of ten days thereafter, if no objection to said report be filed, the said superior court or a judge thereof, may, without further notice give and make its order confirming said report and fixing the tax in accordance therewith. At any time prior to the making of said order, any person interested in said proceeding (including the state controller) may file objections in writing to said report. Thereupon said superior court shall, by order, fix a time, not less than ten days thereafter, for the hearing thereof, and shall direct the clerk of said superior court to give such notice thereof as it shall deem necessary; provided, that a copy of such notice and of such objections shall be forthwith mailed to the state controller, county treasurer, and inheritance tax appraiser. Upon the hearing of said

objections, said court may make such order as to it may seem meet and proper in the premises.

ORDER THAT NO INHERITANCE TAXES DUE.—(3) If, upon examination of the executor or administrator of said estate or other persons familiar with the affairs of such decedent, or from other information before him, it shall appear to the inheritance tax appraiser that there is no inheritance tax due out of said estate or a lien upon any property or interest therein, said appraiser may so certify to the superior court, and at any time thereafter, if no objection to said certificate shall have been filed, said superior court or a judge thereof may, without further notice, make an order or decree that there are no inheritance taxes due out of said estate or upon any interest therein or may make such different order as may to it seem meet in the premises. Such order shall be conclusive only as to such property as may have been returned in the inventory or inventory and appraisement in said probate proceedings.

DETERMINATION OF TAXABILITY OF TRANSFER.—**SEC. 17.**—

(1) If it shall appear to the superior court upon petition of the state controller that any transfer has been made within the meaning of this act, and the taxability thereof, and the liability for such tax and the amount thereof have not been determined, and that no proceedings are pending in any court in this state wherein the taxability of such transfer and the liability therefor and the amount thereof may be determined, said court shall issue a citation ordering and directing the persons who may appear liable therefor or known to own any interest in or part of the property transferred, to appear before said court or before an inheritance tax appraiser to be designated by said order at a time and place in said order named, not less than ten days nor more than one year from the date of such order, to be examined, under oath by said court or by said appraiser as the case may be, concerning said

transfer and all facts connected therewith, and concerning the property transferred and the character and value thereof.

EXAMINATION BY APPRAISER AND REPORT OF FINDINGS.—

If said person or persons shall be directed to appear before said appraiser said appraiser shall, at the time and place in said order named, or at such time and place to which said appraiser may adjourn said hearing, proceed to examine said person or persons and such witnesses as said appraiser may subpoena before him, and for the purpose of said hearing, and for the purpose of ascertaining any facts concerning the taxability of said transfer or any taxes due on account of such transfer, said appraiser shall have the powers of a referee of said court, and, is hereby authorized to issue subpoenas compelling the attendance of witnesses before him, and to administer oath, and to take the evidence of such witnesses under oath concerning such property and the value thereof and concerning such transfer. Said appraiser shall report to said court his findings and conclusions in relation to said transfer and said tax, and may return to said court, any depositions, exhibits or other testimony or information taken before him or exhibited to him. The procedure subsequent to the filing of said report shall conform to subdivision (2) of section sixteen of this act.

SERVICE OF CITATION.—Except as herein otherwise provided, the service of such citation and the time, manner, and proof thereof, and the hearing and determination thereon, and the hearing and determination upon the facts returned in such report, and the enforcement of the determination or decree, shall conform to the provisions of chapter twelve, title eleven, part three of the Code of Civil Procedure, and the clerk of the court shall, upon the request of the state controller, furnish, without fee, one or more transcripts of such decree, and the same shall be docketed and filed by the county clerk of any county in

the state, without fee, in the same manner and with the same effect as provided by section six hundred and seventy-four of said Code of Civil Procedure for filing a transcript of an original docket.

HEARING BY COURT.—The superior court may hear the said cause upon the relation of the parties and the testimony of witnesses, and evidence produced in open court, and, if the court shall find said property is not subject to any tax, as herein provided, the court shall, by order, so determine; but if it shall appear that said property, or any part thereof, is subject to any such tax, the same shall be appraised and taxed as in other cases.

PETITION TO DETERMINE TAXABILITY.—(2) Verified petitions may be filed by any interested party with the superior court, alleging and admitting that a transfer within the meaning of this act has been made and the taxability thereof and the liability for such tax and the amount thereof have not been determined, and that no proceedings are pending in any court in this state wherein the taxability of such transfer and the liability therefor and the amount thereof, may be determined, and that the petitioner desires such determination and desires to pay said tax, if any be due. Upon the filing of such petition the superior court or a judge thereof shall by order designate and appoint an inheritance tax appraiser to ascertain and report to said court the amount of the inheritance tax, if any, due by said petitioner on account of such transfer, and shall fix a time and place, not less than ten days thereafter, for the hearing of said matter before said inheritance tax appraiser, a copy of which petition and order shall be forthwith mailed to the state controller, and shall refer said petition and said matter to said inheritance tax appraiser who shall have all of the powers of a referee of said court, including the powers prescribed in subdivision (1) of section sixteen of this act. The procedure subsequent to said reference to said

appraiser shall conform to the provisions of subdivisions (1) and (2) of section sixteen of this act.

COMPENSATION OF APPRAISER.—In the event that final judgment is rendered in said proceeding, ascertaining and determining that no inheritance tax is due on account of said transfer or that the amount of the tax to which said transfer is liable, is less than twenty dollars the court shall, in addition to the amount of the tax, if any, include in such judgment and assess against the petitioner reasonable compensation for said inheritance tax appraiser, not exceeding the sum of ten dollars, and the necessary traveling and incidental expenses of said appraiser.

ACTION TO QUIET TITLE.—(3) Actions may be brought against the state by any interested person for the purpose of quieting the title to any property against the lien or claim of lien of any tax or taxes under this act, or for the purpose of having it determined that any property is not subject to any lien for taxes nor chargeable with any tax under this act. No such action shall be maintained where any proceedings are pending in any court in this state wherein the taxability of such transfer and the liability therefor and the amount thereof may be determined. All parties interested in said transfer and in the taxability thereof shall be made parties thereto and any interested person who refuses to join as plaintiff therein may be made a defendant. Summons for the state in said action shall be served upon the state controller.

HEARING BY APPRAISER.—At any time after issue is joined in such action the court, on its own motion, or upon the motion of any interested party, may by order appoint and designate an inheritance tax appraiser to hear said matter and report to the court thereon and shall in such order fix a time and place for the hearing of said matter before said inheritance tax appraiser, and direct notice of such time and place to be given in such manner as the

court shall deem proper, and shall refer said matter to said inheritance tax appraiser who shall have all of the powers of a referee of said court, including the powers prescribed in subdivision (1) of section sixteen of this act. The procedure subsequent to said reference to said appraiser shall conform to the provisions of subdivision (1) and (2) of section sixteen of this act.

JUDGMENT IN FAVOR OF STATE.—Should the court determine that the property described in the complaint is subject to the lien of said tax and that said property has been transferred within the meaning of this act, the court shall award affirmative relief to the state in said action, and judgment shall be rendered therein in favor of the state, ascertaining and determining the amount of said tax, and the person or persons liable therefor, and the property chargeable therewith or subject to lien therefor, and shall assess against such person or persons reasonable compensation for said inheritance tax appraiser and his necessary traveling and incidental expenses.

ACTIONS COMMENCED, WHERE.—(4) Actions under this section shall be commenced in the superior court of the county in which is situated any part of any real property against which any lien is sought to be enforced, or to which title is sought to be quieted against any lien, or claim of lien; but if in said action no lien against real property is sought to be enforced, the action shall be brought in the superior court of the county which has or which had jurisdiction of the administration of the estate of the decedent mentioned herein.

NO FEES CHARGED.—(5) No fee shall be charged said state controller by any public officer in this state for the filing or recording of any petition, lis pendens, decree, or order, or for the taking of oaths or acknowledgments in any proceeding taken under this act; nor shall any undertaking be required from or costs charged against the state

controller or the state of California in any such proceeding.

ORDERS HAVE FORCE OF JUDGMENTS IN CIVIL ACTIONS.—
SEC. 18.—The orders, decrees, and judgments fixing tax or determining that no tax is due, mentioned in this act, shall have the force and effect of judgments in civil actions. Except as otherwise herein provided, the provisions of the Code of Civil Procedure relative to judgments, new trials, appeals, attachments, and execution of judgments, so far as applicable, shall govern all proceedings taken under this act. Nothing in this section shall preclude the state from relief herein provided for, which may be inconsistent with the provisions of the Code of Civil Procedure.

TAXES PAID TO STATE TREASURER.—SEC. 19.—The treasurer of each county shall collect all taxes and moneys that may be due and payable under this act and pay the same to the state treasurer (excepting such moneys as he may pay out from time to time pursuant to the provisions of this act) and the state treasurer shall give him a receipt therefor; of which collection and payment he shall make a report, under oath, to the controller, between the first and fifteenth days of May and December of each year, stating for what estate paid, and in such form and containing such particulars as the controller may prescribe; and for all such taxes collected by him and not paid to the state treasurer by the first day of June and January of each year he shall pay interest at the rate of ten per centum per annum.

PERCENTAGE OF TAX RETAINED BY COUNTY TREASURER.—
SEC. 20.—The treasurer of each county shall be allowed to retain, on all taxes paid and accounted for by him each year under this act, in addition to his salary or fees now allowed by law, three per centum of the first fifty thousand dollars so paid and accounted for by him, one and one-half per centum on the next fifty thousand dollars so

paid and accounted for by him, and one-half of one per centum on all additional sums so paid and accounted for by him; provided, that no county treasurer shall be entitled to retain to his own use more than the sum of two hundred dollars out of the inheritance taxes paid on account of any transfer or transfers made by, or resulting from the death of, any one decedent, nor more than five thousand dollars out of the total inheritance taxes accounted for in any one year.

STATE CONTROLLER MAY EMPLOY COUNSEL.—SEC. 21.—The state controller, whenever he shall be cited as a party in any proceeding or action to determine any tax under this act provided, or whenever he shall deem it necessary for the better enforcement of this act to make any special employment to secure evidence of evasion of said tax, or to commence or appear in any proceeding or action to determine any tax hereunder, may, by and with the consent and approval of the attorney-general, make such special employment or designate and employ counsel or attorney in or out of this state to represent him on behalf of the state, and, by and with such consent of the attorney-general, he is hereby authorized to incur the necessary expense for such employment and any reasonable and necessary expense incident thereto. And the county treasurer is hereby authorized and directed to pay out of any funds which may be in his hands on account of this tax, on presentation of a sworn itemized account and on certificate of the state controller and attorney-general, all expenses incurred as in this section above provided, but no expense for such special employment or legal services, up to and including the entry of the order of the court fixing the tax and the same becoming final, shall exceed ten per centum of the tax and penalties collected; provided, that all reasonable and necessary expenses incurred, in any legal action or proceeding in any court of this state or on any appeal therefrom, other than attorney's

fees, including expense of serving processes and printing and preparing of necessary legal papers, may be allowed and paid in the manner above provided, even though no tax be recovered in such action or proceeding, and the limitations herein made shall not apply thereto.

DISPOSITION OF TAXES COLLECTED.—SEC. 22.—All taxes levied and collected under this act, up to the amount of two hundred and fifty thousand dollars annually, shall be paid into the treasury of the state, for the uses of the state school fund, and all taxes levied and collected in excess of two hundred and fifty thousand dollars annually shall be paid into the state treasury to the credit of the general fund thereof.

PENALTY FOR FAILURE TO PERFORM DUTY.—SEC. 23.—Every officer who fails or refuses to perform, within a reasonable time, any and every duty required by the provisions of this act, or who fails or refuses to make and deliver within a reasonable time any statement or record required by this act, shall forfeit to the state of California the sum of one thousand dollars, to be recovered in an action brought by the attorney-general in the name of the people of the state on the relation of the controller.

CONSTITUTIONALITY.—SEC. 24.—If any section, subsection, sentence, clause, or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause, and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses, or phrases be declared unconstitutional.

ACTS REPEALED. PENDING SUITS, ETC., NOT AFFECTED.—SEC. 25.—An act entitled “An act to establish a tax on gifts, legacies, inheritances, bequests, devises, successions, and transfers, to provide for its collection and to direct the disposition of its proceeds; to provide for the

enforcement of liens created by this act and by any act hereby repealed and for suits to quiet title against claims of liens arising hereunder or under an act hereby repealed to be known as the 'inheritance tax act'; to repeal an act entitled 'An act to establish a tax on gifts, legacies, inheritances, bequests, devises, successions, and transfers, to provide for its collection, and to direct the disposition of its proceeds; to provide for the enforcement of liens created by this act and for suits to quiet title against claims of liens, arising hereunder; to repeal an act entitled "An act to establish a tax on gifts, legacies, inheritances, bequests, devises, successions, and transfers; to provide for its collection, and to direct the disposition of its proceeds; to provide for the enforcement of liens created by this act and for suits to quiet title against claims of liens arising hereunder"; to repeal an act entitled "An act to establish a tax on collateral inheritances, bequests, and devises, to provide for the collection and to direct the disposition of its proceeds," approved March 23, 1893, and all amendments thereto, and to repeal all acts and parts of acts in conflict with this act, approved March 20, 1905, and all amendments thereto, and all acts and parts of acts in conflict with this act,' approved April 7, 1911"; approved June 16, 1913, and all amendments thereto, and all acts and parts of acts in conflict with this act are hereby expressly repealed; provided, however, that such repeal shall in nowise affect any suit, prosecution, or proceeding pending at the time this act shall take effect, or any right which the state of California may have at the time of the taking effect of this act, to claim a tax upon any property under the provisions of the act or acts hereby repealed, for which no proceeding has been commenced, and where no proceeding has been commenced to collect any tax arising under any act hereby repealed the procedure to collect such tax shall conform to the provisions hereof; nor shall such

repeal affect any appeal, right of appeal in any suit pending, or orders fixing tax, existing in this state at the time of the taking effect of this act.

Explanatory notes.—¹ California Statutes of 1917, chap. 589, p. 880.
² Reading as follows: An act to establish a tax on gifts, legacies, inheritances, bequests, devises, successions, and transfers, to provide for its collection and to direct the disposition of its proceeds; to provide for the enforcement of liens created by this act and by any act hereby repealed and for suits to quiet title against claims of liens arising hereunder, or under an act hereby repealed, to be known as the "Inheritance Tax Act"; and to repeal chapter five hundred ninety-five of the laws of the session of the legislature of California of 1913, approved June 16, 1913, known as the "Inheritance Tax Act," and all amendments thereto, and to repeal all acts and parts of acts in conflict with this act. Approved May 23, 1917. In effect July 27, 1917.

REFERENCES.

Appraisalment of estates of decedents.—See Kerr's Cyc. Code Civ. Proc., § 1444. Special notices to heirs, devisees, and legatees during administration.—See Kerr's Cyc. Code Civ. Proc., § 1380. Payment of tax on estate or interest in joint tenancy terminating by reason of death.—See Kerr's Cyc. Code Civ. Proc., § 1723. Payment of inheritance tax before distribution of estate.—See Kerr's Cyc. Code Civ. Proc., § 1669. Right of appeal to supreme court.—See Kerr's Cyc. Code Civ. Proc., § 963, subd. 3.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona—Revised Statutes of 1913, paragraphs 4995-5036.

Colorado—Laws of 1913, chapter 136, page 539; Laws of 1909, chapter 193, page 460.

Hawaii—Revised Laws of 1915, sections 1323-1346; as amended by Act 223 of 1917, page 436.

Idaho—Compiled Statutes of 1919, sections 3371-3395.

Kansas—General Statutes of 1915, section 11203; Laws of 1917, chapter 319, page 469.

Montana—Revised Codes of 1907, sections 7724-7751; Supp. of 1915, page 781, section 7724; and section 7731, Rev. Codes of 1907, as amended by Laws of 1917, chapter 40, page 42.

Nevada—Statutes of 1913, chapter 266, pages 411-422.

North Dakota—Laws of 1917, chapter 231, page 320; repealing sections 8976-9000, both inclusive, of the Compiled Laws of 1913.

Oklahoma—Laws of 1915, chapter 162, page 215; and amendments of Laws of 1917, chapter 266, pages 488, 489.

Oregon—Laws of 1915, chapter 42, page 56; Laws of 1917, chapter 372, page 799.

South Dakota—Laws of 1915, chapter 217, page 419.

Utah—Compiled Laws of 1907, chapter 36, page 523, sections 1220X-1220X31; as amended by Laws of 1915, chapter 28, page 35, and by Laws of 1917, chapter 87, page 250.

Washington—Inheritance Tax Act as amended by Laws of 1917, chapter 146, page 593.

Wyoming—Statutes of 1910, sections 2455-2473; Laws of 1915, chapter 34, page 29.

§ 1044. Form. Petition for appointment of appraiser where value of property subject to tax is uncertain.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

To the Honorable the —² Court of the County ³ of —, State of —.

The undersigned, your petitioner, respectfully represents, That said — died testate in the state of —, on or about the — day of —, 19—; and that he was, at the time of his death, a resident of the county ⁴ of —, in said state;

That on the — day of —, 19—, the —⁵ court of said county ⁶ of —, state of —, appointed — as executor of the last will of said deceased; that the said — qualified as such executor; that letters testamentary were issued to him; and that he is now the duly qualified and acting executor of said estate;

That said decedent died possessed of certain property which is or may be subject to the payment of a tax imposed by law in relation to gifts, legacies, inheritances, bequests, devises, successions, and transfers; and that said property is particularly described as follows, to wit, —;

That the value of said property which is or may be subject to said tax as aforesaid is uncertain; and that before said tax can be collected, it will be necessary to ascertain the value of said property; and

That your petitioner is a taxpayer ⁷ in the said county ⁸ of —, and as such is interested in having said tax paid.

Wherefore petitioner asks for an order appointing an appraiser to ascertain and report to this court the value of said property of said estate hereinbefore described.

—, Attorney for Petitioner. —, Petitioner.

Explanatory notes.—1 Give file number. 2 Title of court. 3 Or, City and County. 4 Or, city and county. 5 Title of court. 6 Or, city and county. 7 Or, according to the fact. 8 Or, city and county. See Henning's General Laws (Cal.), p. 143, § 14.

§ 1045. Form. Inheritance tax petition. (Colorado.)

[Title of court.]

[Title of matter.]

[Title of form.]

State of Colorado, }
County ¹ of —. } ss.

To the Honorable —, Judge of the County Court of the County ² of —, Colorado:

The petition of — respectfully shows:

First. That your petitioner is the —³ of deceased, and, as such, a person interested in the estate of the said deceased.

Second. That the said decedent departed this life on the — day of —, at —; that the said decedent was a resident of —.

Third. That letters —⁴ on the estate of said deceased were, on the — day of —, issued to your petitioner by the county court of the county ⁵ of —, Colorado, and that his post-office address is —.

Fourth. That, as your petitioner is informed and believes, the property of said decedent, or some portion thereof or some interest therein is, or may be, subject to the payment of the tax imposed by the law in relation to public revenue.

Fifth. That all persons who are interested in said estate and who are entitled to notice of all proceedings therein, and their post-office addresses, are as follows:

Names.	Residences.	Relationship.	Interest.	Valuation.
—	—	—	—	—
—	—	—	—	—

Also give the names of the treasurer and the attorney-general of the state of Colorado, with their addresses.

That all the above-named are of full age and sound mind, except: —.⁶

Wherefore your petitioner prays that you will designate an appraiser, as provided by law.

Dated —, 19—. —, Petitioner.

State of Colorado, }
County ⁷ of —, } ss.

—, being duly sworn, deposes and says, That he is the petitioner herein; that he has read the foregoing petition subscribed by him and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

—, Petitioner.

Subscribed and sworn to before me this — day of —, 19—. —, Clerk of the County Court.

By —, Deputy.

Explanatory notes.—1, 2 Or, City and County. 3 State relationship. 4 Testamentary, or, according to the fact. 5 Or, city and county. 6 State the facts. 7 Or, City and County. See 3 Mills' Ann. Stats. (Colo.), § 3822.

§ 1046. Form. Order appointing appraiser of property subject to.

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

It appearing to the court that the value of certain interests in the estate of said deceased, subject to collateral inheritance tax, are uncertain, —

It is hereby ordered by the court, That —, a competent person be, and he is hereby, appointed appraiser herein to appraise all inheritances or interests herein subject to collateral inheritance tax;² that he give notice of

the time and place at which he will appraise said property to all persons known to have or to claim an interest therein,³ also to —, ⁴ by written notice mailed at least —⁵ days prior thereto; and that he report such appraisal to this court in writing, stating separately the value of the interest of each person interested in said estate, together with any other facts, in relation to said matter, which may come to his knowledge, and which may tend to assist the court in assessing and fixing the market value of any interest in said estate subject to said tax.

—, Judge of the — Court.

Dated —, 19—.

Explanatory notes.—¹ Give file number. ² Or, to appraise the value of the shares of — and —, in the property of said deceased; or, to appraise property devised by the will of said deceased to — and —. ³ Or, to the said persons named. ⁴ As directed by the court. ⁵ As ordered by the court. See Henning's General Laws (Cal.), p. 143, § 14.

§ 1046.¹ Form. Order appointing appraisers, including the inheritance tax appraiser. (California.)

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

It is ordered that —, —, and —, three disinterested persons, competent and able to act, be and they are hereby appointed appraisers of the estate of —, deceased.²

And good cause appearing therefor, it is further ordered that the said —,³ the duly designated and appointed inheritance tax appraiser, ascertain and report to this court the amount of inheritance taxes due out of said estate or which may be a lien or charge upon any property or upon the interest of any person therein, as provided in the inheritance tax act.

—, Judge of the Superior Court.

Dated —, 19—.

Explanatory notes.—1 Give file number. 2 One of these three appointees must be the inheritance tax appraiser, provided for by law. At the time of appointing appraisers, the court or a judge thereof must, under section 16 of the inheritance tax act of 1917, appoint an inheritance tax appraiser, unless such designation and appointment has previously been made. 3 Naming him.

§ 1046.² Form. Order appointing inheritance tax appraiser as sole appraiser of estate. (California.)

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

It is hereby ordered, That —,² the duly designated and appointed inheritance tax appraiser, as provided by law, be and he is hereby appointed sole appraiser of the estate of —.³

Dated —, 19—. —, Judge of the Superior Court.

Explanatory notes.—1 Give file number. 2 Naming him. 3 Under the act of 1917, the court may, in its discretion, do this.

§ 1047. Form. Order appointing appraiser. (Colorado.)

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

Upon the application of —, it is ordered, That —, of the county ² of —, state of Colorado, be, and he is hereby, appointed appraiser, to appraise and fix the fair market value of the property of which —, late of the county ³ of —, state of —, died seised and possessed, subject to taxation, under and pursuant to chapter 3 of the revenue law of 1902, and any laws amendatory thereof or supplementary thereto.

It is further ordered, That said appraiser give notice, as required by law, to all persons known to have a claim to, or interest in, said property, and —, attorney-general of the state of Colorado, and —, treasurer of said state, of the time and place when he will appraise and fix the fair market value of such property.

And it is further ordered, That said appraiser make a

§ 1049. Form. Notice of time and place of appraisement.

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

To —, —, and —. ²

You are hereby notified, That on the — day of —, 19—, I, the undersigned, was, by order of the above-entitled court, appointed an appraiser to appraise all inheritances or interests in the above-entitled estate subject to collateral-inheritance tax under the laws of this state; and that, in pursuance of law, I will, on the — day of —, 19—, at the hour of — o'clock in the forenoon ³ of said day, at —, in the county ⁴ of —, state of —, proceed to appraise all of the property of said estate subject to said tax.

Dated —, 19—.

—, Appraiser.

Explanatory notes.—1 Give file number. ² To be given, by mail, to all persons known to have or to claim an interest in the property. ³ Or, afternoon. ⁴ Or, city and county. See Henning's General Laws (Cal.), p. 143, § 14.

§ 1050. Form. Report of appraiser of tax. (Colorado.)

[Title of court.]

[Title of matter.]

[Title of form.]

{ Decedent died —, 19—, a legal resident
of the County ¹ of —, State of Colorado.

State of Colorado, }
County ² of —. } ss.

To the Honorable —, Judge of the County Court of the County ³ of —, State of Colorado.

I, the undersigned, appraiser, who was, by an order of the county court of the county ⁴ of —, state of Colorado, duly made and entered on the — day of —, 19—, directed to appraise the property of said decedent, at its fair market value at the time of the death of decedent, in pursuance of the laws in relation to public revenue, do respectfully report:

First. That, pursuant to chapter 3 of the laws of 1902,

I duly took and subscribed the oath prescribed by statute, and filed the same as therein provided.

Second. That, on the — day of —, 19—, I gave notice as follows, by mail, postage prepaid, to such persons, corporations, etc., known to have, or to claim, an interest in any property of said decedent subject to the payment of any tax imposed by said laws, including the attorney-general and treasurer of the state of Colorado, state auditor, and those persons or corporations named by the said county court in its order, of the time and place at which I would appraise said property; and that a true copy of said notice, together with proof of mailing, is hereto annexed. Said notice, as aforesaid, was given to —, residing at —, stating relationship and nature of interest; —, residing at —, stating relationship and nature of interest; —, executor of said estate, residing at —; attorney-general, —, residing at —; state treasurer, —, residing at —; and state auditor, —, residing at —.

Third. At the time and place in said notice stated, namely, on the — day of —, 19—, at — (and at other subsequent times and divers places to which these proceedings were regularly adjourned), I appraised all the property, real, personal, and mixed, of which the said decedent died possessed, at its fair market value at the time of the death of decedent, as follows, to wit:

Notes, Stocks, Bonds, and Accounts.

Give each item, stating the kind or by whom
owing, the date, principal or amount, inter-
est (rate and amount), whether good,
doubtful, or desperate, and the value.....\$—
Total value\$—
Other personal property, giving description
and valuation —
Total value\$—

Real Estate.

Description of each parcel of land, including
 acres, nature or kind, section, township,
 range, and county, with value of land and
 improvements\$——
 Water rights belonging thereto, with shares
 in companies, if any, and value..... ——
 Additions and subdivisions, giving lot, block,
 town, or city and county, with value..... ——
 Total value\$——

Fourth. I further report that decedent's estate is sub-
 ject to the following deductions on account of debts,
 claims, expenses of administration, and commissions, as
 follows, to wit,—

Deductions on Account of Debts, etc.

Debt or claim of ——, nature of same, and
 amount\$——
 Debt or claim of ——, nature of same, and
 amount ——
 Total amount\$——

Fifth. Recapitulation.

Total amount of decedent's real estate.....\$——
 Total amount of decedent's personal estate... ——
 Total\$——

From which debts, expenses of administration,
 as enumerated in the "Fourth" finding
 above are to be deducted, amounting to....\$——

Leaving the sum of.....\$——
 which is the net estate transferred by the
 testator's will (or the intestate laws of the
 state) as follows:—

Names and residences of the persons, corpora-
 tions, or institutions receiving any property,
 giving relation to decedent, nature of inter-
 est (whether absolute or otherwise), and
 stating whether the same is real or personal

property, with value of property or interest
transferred\$——

Total amount of property transferred.....\$——

Sixth. I further report that all of said persons interested in said estate are of sound mind, and of full age except ——.

Seventh. I further report that the following appearances were made before me in this proceeding: ——.

Eighth. I further report as follows: Name of decedent ——. Date of decedent's death ——. That the six-months' limitation from said date of death expires on the —— day of ——, 19——. Decedent was a resident of the town of ——, county of ——, state of ——. Decedent left ——⁵ will. Letters ——⁶ were duly issued on the —— day of ——, 19——, by the county court of the county of ——, state of Colorado, upon the estate of said deceased, ——, to ——, whose post-office address is ——.

Ninth. I further report that filed herewith is all the testimony taken by me, and the copies of all papers presented to me in this proceeding, namely: ——.⁷

Tenth. I do further report, that the said deceased did ——⁸ make ——⁹ transfer —— of¹⁰ property by deed, grant, bargain and sale, or gift in contemplation of death, or intended to take effect in possession or enjoyment at or after death of said deceased.

Eleventh. I further report that the following witnesses were subpoenaed before me; that the address, attendance, and miles necessarily traveled, one way, are as follows, to wit:

[Name of witness, with address, days in attendance, and mileage.]

Twelfth. I do further report that I was actually and necessarily employed ——¹¹ days in the matter of said appraisalment, and that my actual and necessary traveling expenses were —— dollars (\$——).

Thirteenth. I do further report that the following per-

sonal property, outside of the state of Colorado, belongs to the estate of the deceased:

Personal Property Outside of State.

Notes, stocks, bonds, accounts, and other personally, giving description, location and value\$——

Fourteenth. I do further report ——.¹²

All of which is respectfully submitted this —— day of ——, 19——. ——, Appraiser.¹³

Explanatory notes.—1-3 Or, City and County. 4 Or, city and county. 5 State whether decedent left a will or not. 6 Testamentary, or, according to the fact. 7 Testimony need not be filed unless ordered by the court. 8 Or, did not. 9 A, or any, as the case may be. 10 His or her. 11 State number of days. 12 State any further facts reported by the appraiser. 13 This report is to be filed and recorded. See 3 Mills' Ann. Stats. (Colo.), § 3822.

§ 1050.¹ Form. Report of inheritance tax appraiser. (California.)

[Title of court.]

[Title of estate.]

{ No. ——.¹ Dept. No. ——.
[Title of form.]

Date of death.

Amount of tax, \$——.

To the Honorable, the Superior Court above named.

——,² the duly appointed, qualified and acting inheritance tax appraiser in the county ³ and proceedings above named, after due and regular hearing had and appraisement made, hereby reports:

That decedent above named died⁴ testate on or about ——,⁵ 19——, a resident of ——,⁶ and left property taxable under the inheritance tax laws of the state of California in the above-entitled proceedings; which property is more particularly described in the inventory and appraisement on file herein, which said inventory and appraisement is hereby referred to and made a part hereof.

That, at the date of death of said decedent, the fair market value of the property of said estate was the sum of \$——.

The following are the items of said property and the valuations thereof:⁷

Brought forward	\$——
Deductions should be made therefrom as follows:	
Expenses of funeral and of last illness...	\$——
Debts of deceased (being allowed claims)	——
Taxes due at decedent's death.....	——
Executor's or administrator's commis-	
sions	——
Fees of attorney for same.....	——
Expenses of administration, being clerk's,	
notary's, appraisers' fees, etc.....	——
Other deductions	——
Total deductions	\$——

The clear market value of said property is therefore \$——.

That said property passed to the following named persons, whose relationship to decedent, the character and clear market value of whose respective interests at the time of the death of decedent and the inheritance or transfer tax due thereon, are as hereinafter shown:

Name——.⁸ Relationship to deceased——.⁹ Exemption and rates ——.¹⁰ Character and value of interest ——.¹¹ Tax ——.¹²

Dated ——, 19——. ——, Inheritance Tax Appraiser.

Explanatory notes.—1 Give file number. 2 Naming him. 3 Or city and county. 4 Or intestate. 5 Giving date. 6 Designating whether of the state or not. 7 Giving the items with the valuation of each. 8, 9 Giving names of persons to whom property passed, and their relationship to deceased. 10 Indicating them. 11 Stating the respective interests of persons to whom property passed at the time of the death of decedent. 12 Stating the tax due on the inheritance or transfer.

§ 1051. Form. Order approving report of appraiser and fixing amount of tax. (Colorado.)

[Title of court.]

[Title of estate.]

[Title of form.]

Date of decedent's death, ——.

On the report of the appraiser duly appointed to fix

the fair market value of the real estate and personal property of which —, late of —, died seised and possessed, subject to taxation under chapter 3 of the laws of 1902, and any act supplemental thereto or amendatory thereof.

It is determined,¹ on this — day of —, 19—, That the cash value of said property be, and the same is hereby, fixed, and the amount of the tax to which the same is liable, as follows:

Names of persons or corporations to whom
property is transferred, giving relationship,
if any, with a general description of the
property, its cash value, amount of tax, and
amount of interest.....\$—
Total\$—
—, Judge.

Explanatory note.—¹ This order should be accompanied by the following notice, namely: To all parties interested in the determination of fixing the value of taxable property and the amount of the tax. Unless otherwise herein expressed, this tax becomes due and payable to the treasurer of the city and county of Denver, upon the death of the decedent. If paid within six (6) months, a discount of five (5) per centum will be allowed. If not paid within six (6) months, interest will be charged at the rate of six (6) per centum from the death of decedent. See 3 Mills' Ann. Stats. (Colo.), § 3822.

§ 1052. Form. Order fixing tax.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

Upon the report of the appraiser herein appointed, it is ordered by the court, That the market value of the property of said estate to be received on distribution and the tax to be paid thereon by the following-named persons respectively, is as follows, to wit: —;² value, — dollars (\$—);³ tax due, — dollars (\$—),⁴ etc.; and that the appraiser of said estate forthwith give notice of the substance of this order to each of said persons, by written notice sent by mail to the respective address of

each person whose address is known to him or to the attorneys of such as have appeared herein.

Done in open court this — day of —, 19—.

—, Judge of the — Court.

Explanatory notes.—1 Give file number. 2-4 Give name of each person separately, with value of each one's interest, and tax due from each. See Henning's General Laws (Cal.), p. 143, § 14.

§ 1052.¹ Form. Order fixing inheritance tax. (California.)

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

—,² the duly and regularly appointed, qualified, and acting inheritance tax appraiser in the above-entitled proceeding, having filed herein his written report and appraisal, and no objections thereto having been filed herein, and it appearing to this court that said appraisal has been fairly and regularly made in accordance with law and the order of this court and that said report is true and correct, and that said decedent died on —, 192—.

It is hereby ordered, adjudged, and decreed:

First: That said report be, and the same is, hereby approved and confirmed as presented and filed.

Second: That the market value of the property subject to inheritance tax in the above-entitled proceeding is \$—; that the persons to whom said property passed from decedent, their relationship to decedent, the value of their respective interests in said property, and the taxes to which the same are respectively liable, are hereby assessed and fixed as follows:

Name and relationship.	Value of interest.	Tax.
—	—	—
—	—	—

That the total amount of inheritance tax due to the state of California out of said estate is \$—.

Done in open court this — day of —, 192—.

—, Judge of the Superior Court.

To the Honorable John S. Chambers,³ controller of state, and —, ⁴ treasurer of the above-named county:

You and each of you will hereby take notice that the above and foregoing order and decree was made and entered in the above-entitled court on the day therein named.⁵

Dated at —, —, 192—.

—, Clerk of the above-entitled court.

By —, Deputy.

Explanatory notes.—1 Give file number. 2 Naming him. 3 Or as the case may be. 4 Naming him. 5 This form is to be written or printed upon, or attached to, the order fixing the inheritance tax.

§ 1053. Form. Notice to county treasurer of intended delivery of securities subject to tax.

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.
[Title of form.]

You are hereby notified, That —, foreign executor of the will of —, deceased, has assigned to — the following stock, obligations, and securities, of the value of — dollars (\$—), now in possession of the undersigned safe deposit and trust company, a corporation, which said securities, etc., stand in the name of said decedent,² and which, having been bequeathed to beneficiaries under said will, are subject to a collateral inheritance tax of — dollars (\$—); said stock, obligations, and securities being described as follows, to wit: —.

And you are further notified, That said company will, on the — day of —, 19—, at —, ³ make delivery and transfer of the same to said —, as requested.

—, Company.

By —, Secretary.

Explanatory notes.—1 Give file number. 2 Or, are held in trust for him. 3 State place. See Henning's General Laws (Cal.), p. 142, § 13.

§ 1054. Form. Treasurer's notice to district attorney that tax is unpaid.

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

To —, —² Attorney of the County ³ of —, State of —.

You are hereby notified, That —, who is a legatee under the will of said —, deceased, and whose interest in the property of said estate is subject to a collateral-inheritance tax under the laws of this state, has neglected to pay said tax; and that I have reason to believe that said tax is now due and unpaid.

—, Treasurer of the County ⁴ of —, State of —.

Explanatory notes.—¹ Give file number. ² District, or as the case may be. ³ Or, City and County. ⁴ Or, city and county. See Henning's General Laws (Cal.), p. 144, § 18.

§ 1055. Form. Petition for citation to show cause why tax should not be paid.

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —.
[Title of form.]

To the Honorable —, Judge of the —² Court of the County ³ of —, State of —.

The undersigned, your petitioner, respectfully represents that said — died in the state of —, on or about the — day of —, 19—; and that he was, at the time of his death, a resident of the county ⁴ of —, in said state;

That on the — day of —, 19—, the —⁵ court of said county ⁶ of —, state of —, appointed — as executor of the last will of said deceased; that the said — qualified as such executor; that letters testamentary were issued to him; and that he is now the duly qualified and acting executor of said estate;

That said deceased died possessed of certain property within this state, a portion of which has been distributed

to —, a non-resident of this state, which portion exceeds in value the sum of five hundred dollars (\$—),⁷ which portion is not exempt from the tax imposed by law upon gifts, legacies, inheritances, bequests, devises, successions, and transfers, but which portion is subject to taxation under said law, and which portion is particularly described as follows, to wit: —.⁸

That your petitioner is the duly elected, qualified, and acting —⁹ attorney for the said county¹⁰ of —, state of —,¹¹ and has been notified in writing by —, the treasurer of said county,¹² that the said distributee, whose duty it is to pay said tax and who is liable therefor, has failed, neglected, and refused to pay the same, and that your petitioner has probable cause to believe that said tax is now due and unpaid.

Wherefore petitioner prays that a citation issue to the said —, requiring him to appear before this court on a day certain and show cause why said tax should not be paid.
—, Petitioner.

Explanatory notes.—1 Give file number. 2 Title of court. 3 Or, City and County. 4 Or, city and county. 5 Title of court. 6 Or city and county. 7 Or, as fixed by statute. 8 Give description. 9 District, or according to the fact. 10 Or, city and county. 11 Or, that your petitioner is an attorney at law, fully admitted to practice in all the courts of the state of —; and that on the — day of —, 19—, the county treasurer of the county of —, in said state, appointed your petitioner a special attorney to prosecute proceedings against persons interested in property liable to said tax under said law. 12 Or, city and county. See Henning's General Laws (Cal.), pp. 144, 145, §§ 17, 18, 23.

§ 1056. Form. Order that citation issue to show cause why tax should not be paid.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

It having been shown to this court that there is certain property belonging to the above-entitled estate, subject to a collateral-inheritance tax imposed by the laws of this state, which tax is now due and unpaid, —

It is ordered, That a citation issue to —² to appear before the court on —,³ the — day of —, 19—, at — o'clock in the forenoon⁴ of said day, in the court-room of Department No. —, of said court, and show cause why the said tax should not be paid.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—1 Give file number. 2 The executor of the will, or to persons known to own any interest in, or part of the property liable to the tax, or to any person or corporation liable, under the law, for the payment of said tax. 3 Not more than ten weeks after the date of such citation. 4 Or, afternoon. See Henning's General Laws (Cal.), § 17.

§ 1057. Form. Citation to show cause why tax should not be paid.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

The People of the State of —.

To —,² Greeting:

By order of this court, You are hereby cited and required to appear before the judge of this court, at the court-room of Department No. — thereof, at the court-house³ in the county⁴ of —, on —,⁵ the — day of —, 19—, at — o'clock in the forenoon⁶ of that day, then and there to show cause why the collateral-inheritance tax, now due and unpaid on property belonging to the above-entitled estate, should not be paid.

Witness, the Honorable —, judge of the court, in and for the county⁷ of —, state of —, with the seal of said court affixed, this — day of —, 19—.

[Seal]

Attest: —, Clerk.

By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2 The executor of the will, or to persons known to own any interest in, or part of the property liable to the tax, or to any person or corporation liable, under the law, for the payment of said tax. 3 Give its location. 4 Or, city and county. 5 Day of week. 6 Or as the case may be. 7 Or, city and county. See Henning's General Laws (Cal.), p. 144, § 17.

§ 1058. Form. Bond of beneficiary to state.

[Title of court.]

[Title of estate.]

{	No. —.1	Dept. No. —.
	[Title of form.]	

Know all men by these presents, That we, — of the county of —, as principal, and — and —, of the same place, as sureties, are held and firmly bound unto the people of the state of —, in the penal sum of — dollars (\$—), gold coin of the United States of America, to be paid to the said people of the state of —, for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents.

The condition of the above obligation is such that whereas an inheritance tax of — dollars (\$—), has been assessed against the said — on account of a legacy to him under the will of said —, deceased, and whereas the said — has elected not to pay said tax until he shall come into the actual possession or enjoyment of said property, —

Now, if the said — shall pay said tax and interest thereon at such time or period as he or his representatives may come into the actual possession or enjoyment of said property, then this obligation is to be void; otherwise, to remain in full force and effect.

Dated, signed, and sealed with our seals this — day of —, 19—.

(Principal) — [Seal]

(Surety) — [Seal]

(Surety) — [Seal]

Explanatory note.—1 Give file number. See Henning's General Laws (Cal.), p. 140, § 5.

§ 1059. Form. Bond of executor or administrator.

[Title of court.]

[Title of estate.]

{ No. ———.1 Dept. No. ———.
[Title of form.]

(First paragraph the same as in § 1058 supra.)

The condition of the above obligation is such that, whereas, the said — is executor of the estate of said —, deceased, and a collateral-inheritance tax of — dollars (\$——), imposed by law upon a legacy to —, under the will of said testator has not been paid by said executor within eighteen months from the death of decedent, and the estate not being ready for settlement, and the said executor not having sufficient money wherewith to pay said tax, —

Now, if the said executor, as such, shall pay, or cause to be paid, the said tax and all interest thereon as soon as the said —² shall come into the actual possession or enjoyment of said property, then this obligation is to be void; otherwise, to remain in full force and effect.

Dated, signed, and sealed with our seals this — day of —, 19—.

(Principal) — [Seal]
(Surety) — [Seal]
(Surety) — [Seal]

Explanatory notes.—1 Give file number. 2 Legatee. See Henning's General Laws (Cal.), p. 141, § 8.

§ 1060. Table of rates and exemptions under the California law of 1917.

Classification or indication of relationship	Property exemption	Application of rates to value of inheritance or legacies						
		On assets other than real estate or community property	\$25,000 or over	\$50,000 or over	\$100,000 or over	\$200,000 or over	\$500,000 or over	In excess of \$1,000,000
Husband, wife, blood issue, blood ancestor, adopted or naturally acknowledged child.	Wife or other child, \$25,000. Others, \$50,000.	7%	5%	4%	7%	10%	10%	10%
Brother, sister, or descendant of either with or widow of a son, husband of a daughter	\$1,000	5%	4%	4%	10%	10%	10%	10%
Uncle, aunt, or descendant of either	\$1,000	4%	5%	10%	10%	10%	10%	10%
Other degree of collateral consanguinity, stranger in blood, body politic or corporate.	\$500	6%	10%	10%	10%	10%	10%	10%

Explanatory notes.—1 Subdivision 2 of section 1 of the act named above provides that the widow's half of the community property shall be exempted from the tax. The law went into effect July 27, 1917.

§ 1060.¹ Form. Return for estate tax, under federal law.

[Title of court.]

[Title of estate.]

{ No. —. ² Dept. No. —.
[Title of form.]

Decedent's name, —. ³ Date of death, —, 192—.
Residence at time of death, —. ⁴

THE GROSS ESTATE.

1. Real estate.

Location. ⁵	Value on day of death.	Income accrued to day of death.
—	\$—	\$—
—	—	—
—	—	—
Total	\$—	\$—
Grand total, realty and income.....	\$—	\$—

2. Transfers.

Include all gifts or other transfers, except bona fide sales, made in contemplation of, or to take effect at, decedent's death.

Name of donee or transferee.	Date of transfer.	Property transferred.	Value.
—	—	—	\$—
—	—	—	—
—	—	—	—
Total			\$—

3. Stocks and bonds.

Number of shares or bonds.	Description or designation.	Value on day of decedent's death.	Income accrued to day of death.
—	—	\$—	\$—
—	—	—	—
—	—	—	—
Grand total, stocks, bonds, and income.....		\$—	\$—

4. Jointly owned property.

Description.	Value of decedent's share at death.	Income accrued to day of death.
_____	\$_____	\$_____
_____	_____	_____
_____	_____	_____
Total	\$_____	\$_____
Grand total, decedent's share and income..	\$_____	

5. Mortgages, notes, and miscellaneous.

Mortgages and notes.	Value at decedent's death.	Income accrued to day of death.
_____	\$_____	\$_____
_____	_____	_____
_____	_____	_____
Miscellaneous; cash; insurance; claims; rights; roy- alties; furniture, paintings, books, etc.; grain; crops; ma- chinery; automobiles, etc.		
_____	\$_____	\$_____
_____	_____	_____
_____	_____	_____
Total	\$_____	\$_____
Grand total, mortgages, notes, and miscel- laneous, and income.....	\$_____	

DEDUCTIONS FROM GROSS ESTATE.

Funeral expense	\$_____
Administration expense:	
Executor's fee	_____
Attorney's fee	_____
Miscellaneous	_____
Claims against estate:	
Mortgages	_____
Debts of decedent.....	_____
Net losses during administration.....	_____
Support of dependents.....	_____
State inheritance tax.....	_____

Other charges allowed by local laws..... —
 Specific exemption ⁵..... —
 Total.....\$—

RECAPITULATION AND NET ESTATE.

Realty\$—
 Gifts and transfers..... —
 Stocks and bonds..... —
 Share in jointly-owned property..... —
 Mortgages, notes, and miscellaneous..... —
 Total gross estate.....\$—
 Total deductions —
 Net estate ⁶\$—
 Total gross estate.....\$—
 Legal proportion of total deductions..... —
 Net estate for tax.....\$—

RATES OF TAXATION UPON NET ESTATES.

		% ⁷	% ⁸	% ⁹	
Net estate not exceeding \$	50,000, @.....	1	1½	2	\$—
Net estate \$	50,000 to 150,000, @.....	2	3	4	—
Net estate	150,000 to 250,000, @.....	3	4½	6	—
Net estate	250,000 to 450,000, @.....	4	6	8	—
Net estate	450,000 to 1,000,000, @.....	5	7½	10	—
Net estate	1,000,000 to 2,000,000, @.....	6	9	12	—
Net estate	2,000,000 to 3,000,000, @.....	7	10¼	14	—
Net estate	3,000,000 to 4,000,000, @.....	8	12	16	—
Net estate	4,000,000 to 5,000,000, @.....	9	13½	18	—
Net estate	5,000,000 to 8,000,000, @.....	10	15	20	—
Net estate	8,000,000 to 10,000,000, @.....	10	15	22	—
Net estate exceeding	10,000,000, @.....	10	15	25	—
Total tax				\$—
Discount at 5 per cent per annum	10 — days.....				\$—
Net tax				\$—

I, —, ¹¹ the undersigned executor, beneficiary, ¹² do hereby solemnly swear that the above statement of gross and net estate of —, ¹³ the above-named decedent, is in all respects true to the best of my ¹⁴ knowledge and belief; that letters — ¹⁵ were granted upon the said es-

tate on the — day of —, 192—, by —,¹⁶ and that this is a final¹⁷ return of the estate.

Subscribed and sworn to before me at —, this — day of —, 192—.

—, Notary Public.¹⁸ — —.¹⁹

Explanatory notes.—¹ Under the Federal Act of Sept. 8, 1916, imposing a tax computed upon the net estate of every decedent dying on or after Sept. 9, 1916, up to and including March 2, 1917. See U. S. Stats. That act was amended on March 3, 1917, such amendment applying rates designated to the net estate of every decedent dying on or after March 3, 1917, up to and including Oct. 3, 1917; and was again amended on Oct. 3, 1917, such amendment applying designated rates to the net estate of every decedent dying on or after Oct. 4, 1917. Under this last named amendment and the act of March 3, 1917, the net estates of military and naval decedents, dying during the continuance of the world war, in which the United States was engaged in 1917, or within one year after the termination of such war, from injuries received or disease contracted in such service, were taxable at the rates imposed by the act of March 3, 1917. See U. S. Stats. ² Give file number. ³ Giving it. ⁴ Street and number; city or town; state, territory, or foreign country. ⁵ Of \$50,000. ⁶ If decedent was a non-resident, show here the total value of the whole estate wherever situate; bearing in mind that the exemption of \$50,000 to be taken in determining the net estates of residents does not apply, nor any part of it, to the estate of a non-resident; the term "non-resident" means one who does not reside in any of the states of the United States, or in the territories of Alaska or Hawaii, or in the District of Columbia. The tax is not imposed in Porto Rico or in the Philippine Islands, but, under the definition of United States, as found in the Estate Tax Act, the property, in the United States, of deceased residents of those islands is taxable as the property of non-residents. ⁷ The percentages given in this column were those imposed under the original act. ⁸ The percentages given in this column were those imposed by the act of March 3, 1917. ⁹ The percentages given in this column were those imposed by the act of Oct. 3, 1917. ¹⁰ Allowed by section 204 of the act for payment in advance. ¹¹ Or administrator, or we, etc. ¹² Or beneficiaries. ¹³ Giving name. ¹⁴ Or our. ¹⁵ Testamentary, or of administration. ¹⁶ Naming the court. ¹⁷ Or tentative. ¹⁸ Or, deputy collector, or other officer authorized to administer the oath. ¹⁹ Address for mail.

§ 1060.* Form. Thirty-day notice to be given by executor or administrator, under federal law.¹

[Title of court.]

[Title of estate.]

{ No. —. ² Dept. No. —.
[Title of form.]

Name of decedent, —. Day of death, —, 192—. Residence at time of death.³

To —, collector internal revenue, —.⁴

I, —, whose signature and address are affixed below, do hereby solemnly declare that on the — day of —, 192—, the —⁵ court at —⁶ granted letters testamentary⁷ to me and to —, —;⁸ and to —,⁹ —,¹⁰ as executors,¹¹ of the estate of the decedent named above; that to the best of my knowledge and belief the gross value of all the property and interests of the said decedent¹² approximates \$—, and that the net value, including property heretofore transferred and property hereafter transferable to beneficiaries, will approximate \$—; that to my knowledge¹³ decedent had property situated in other internal revenue districts as follows, —;¹⁴ and that, prior to this day, the following-named beneficiaries, or their legal representatives, have received gifts or transfers made by the said decedent in anticipation of or to take effect at the decedent's death, or advances upon their interests in the estate:

Beneficiary's name, —	Address, —;
Beneficiary's name, —	Address, —;
Beneficiary's name, —	Address, —.

Each and all of the statements made herein I solemnly aver to be true to the best of my knowledge and belief.

Executor's name, —.

Date —, 192—.

Address, —.

Explanatory notes.—¹ Under the Federal Estate Tax Law of 1916, to be filed by the executor or administrator, within 30 days after the court's issuance of letters testamentary or of letters of administration, with the collector of the district in which the decedent was a resident at the time of his death. ² Give file number. ³ If the decedent was a non-resident of the United States, Hawaii, or Alaska, his principal

place of residence in a foreign country, Porto Rico, or the Philippine Islands, should be given. 4 Give name of collector and designate his district. If the decedent was a non-resident of the United States, Hawaii, or Alaska, the notice must be filed with the collector in whose district the property in the United States, Hawaii, or Alaska was situated; if such property was situated in more than one district, the notice must be filed with the Collector of Internal Revenue, Baltimore, Md. 5 Name the court. 6 Location of court. 7 Or of administration. 8-10 Naming the others. 11 Or administrators. 12 The gross estate, as defined in the law, includes the estate in charge of executors or administrators, gifts or transfers of any kind made by decedent in contemplation of, or intended to take effect at, decedent's death, decedent's interest in joint bank accounts and in other property jointly owned, certain insurance, etc. Executors and administrators are required by the law to ascertain such property and to make return thereof. 13 Or belief. 14 Give city or town, and state or territory. This information need be given only in the case of property of a non-resident. This notice is required only where either the gross estate, as defined in the law, exceeds \$60,000, or the net estate exceeds the exemption of \$50,000, except that it is required in the case of the estate of every non-resident decedent having property or interests within the United States, Hawaii, or Alaska. Further information, in detail, concerning the statute under consideration, will be found in the Law and Regulations relating to the Estate Tax, printed by the Treasury Department, United States Internal Revenue, at the Government Printing Office, Washington, D. C.

INHERITANCE TAXES.

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| 1. Scope of statute. | (5) Community property. |
| 2. Nature of tax. | (6) Homesteads. |
| 3. Power to impose. | (7) Joint tenancy. |
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| <p>11. Practice. Collection. State controller.</p> <p>(1) Right of state.</p> <p>(2) Practice. Collection. Commission.</p> <p>(3) Final account to show payment of tax.</p> <p>(4) Power and duty of state controller.</p> | <p>12. Actions.</p> <p>(1) In general.</p> <p>(2) Defenses.</p> <p>(3) Pleading and evidence.</p> <p>(4) Question of fact.</p> <p>(5) Laches and limitations.</p> <p>(6) Conclusiveness of judgment.</p> <p>13. Appeal.</p> |
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1. Scope of statute.—The scope of The California Inheritance Tax Act of 1893, was limited by its title to collateral inheritances.—*Wirringer v. Morgan*, 12 Cal. App. 26, 106 Pac. 425. Illegitimate children acknowledged by their father in accordance with the Civil Code of California, section 1387, are not "collateral heirs."—*Wirringer v. Morgan*, 12 Cal. App. 26, 106 Pac. 425.

2. Nature of tax.—An inheritance tax is a tax which the person who inherits is liable to pay and is not a debt or charge against the decedent or the estate.—*People v. Palmer's Estate*, 25 Colo. App. 450, 139 Pac. 555. An inheritance tax is not a tax upon property but on the right to succeed to the property.—*People v. Palmer's Estate*, 25 Colo. App. 450, 139 Pac. 555. An inheritance tax is not a tax upon property but is a charge upon the right or privilege of receiving it.—*In re Stixrud's Estate*, 58 Wash. 339, Ann. Cas. 1912A, 850, 33 L. R. A. (N. S.) 632, 109 Pac. 317. Under the so-called Inheritance Tax Law, taxes are imposed, not on the interest to which some person succeeds on a death, but on the interest that ceased by reason of the death.—*Cole v. Nickel* (Nev.), 177 Pac. 409. An inheritance tax, not being a tax upon the property but upon the right to take it, can not be said to reduce the value of the property that passes.—*People v. Palmer's Estate*, 25 Colo. App. 450, 139 Pac. 555. An inheritance tax is not a tax upon property, but is a tax or excise upon the power or right of transmitting property or receiving property by will, or under intestate laws.—*In re Macky's Estate*, 46 Colo. 79, 23 L. R. A. (N. S.) 1207, 102 Pac. 1076. The inheritance tax is a charge upon succession by inheritance or transfer by will.—*McDougald v. Low*, 164 Cal. 107, 127 Pac. 1027, 1028. An inheritance tax is not a tax upon the property itself, but rather a duty or burden imposed by the state upon the privilege of acquiring property by inheritance; the statute authorizing it is free from constitutional objections.—*Estate of Touhy*, 35 Mont. 431, 90 Pac. 170. An inheritance tax is a duty the state imposes upon the right to take property by will or succession, or by instrument becoming effective after death; it is not a tax upon the estate of the decedent.—*In re Blackburn's Estate*, 51 Mont. 234, 152 Pac. 31, *Blackburn v. State*, 51 Mont. 234, 152 Pac. 31. An inheritance tax is not an imposition upon property, but is an exaction by the state for the right to receive or take property by testamentary disposition or succession, or by any deed or instrument to take effect at or after the death of the testator.—*State v. District Court*, 45 Mont. 335, 339, Ann. Cas. 1914A, 469, 122 Pac. 922. It is the succession law.—162

cession which is the subject of the inheritance tax, not the thing inherited.—*Walker v. People* (Colo.), 171 Pac. 747.

REFERENCES.

Nature of an inheritance tax.—See note 33 L. R. A. (N. S.) 606. Inheritance taxation.—See note in 127 Am. St. Rep. 1035.

3. Power to impose.—A collateral-inheritance or succession tax is a duty or bonus, exacted in certain instances by the state, upon the right and privilege of taking legacies, inheritances, gifts, and successions passing by will, by intestate laws, or by any deed or instrument made inter vivos, intended to take effect after the death of the grantor. The burden or the tax is not imposed upon the property itself, but upon the privilege of acquiring the property by inheritance. In nearly all inheritance tax laws, the statutes provide for appraising the property to be inherited, but the object of such valuation is not to tax the property itself. It is to arrive at a measure of price by which the privilege of inheritance can be valued.—*In re Tuohy's Estate*, 35 Mont. 431, 90 Pac. 170, 172. Since the tax is imposed upon the privilege of receiving or taking property, and not upon the property itself, and since the privilege is itself not a natural right but a creature of law, it follows, as a corollary, that, except so far as it is clearly restricted by the constitution, the legislature may impose such burdens as it may see fit. The legislative power is not restricted, in this regard, by provisions of the constitution regarding equality and uniformity in the levy of ordinary taxes upon property; prescribing a maximum rate for state taxation; fixing the valuation of a certain class of property; or providing for exemptions.—*In re Tuohy's Estate*, 35 Mont. 431, 90 Pac. 170, 172. The right of inheritance, including the designation of heirs and the proportions which the several heirs shall receive, as well as the right of testamentary disposition, are entirely matters of statutory enactment, and within the control of the legislature. As it is only by virtue of the statute that the heir is entitled to receive any of his ancestor's estate, or that the ancestor can divert his estate from the heir, the same authority which confers this privilege may attach to it the condition, that a portion of the estate so received shall be contributed to the state, and the portion thus to be contributed is peculiarly within the legislative discretion.—*In re Wilmerding's Estate*, 117 Cal. 281, 49 Pac. 181, 182. The underlying principle that supports the inheritance tax is that the right of succession is not a natural one, but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question, and when the right is conferred by a lawfully executed grant or contract it is property, and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties.—*Hunt v. Wicht*, 174 Cal. 205, L. R. A. 1917C, 961, 162 Pac. 639. The legislature can not, after an estate has fully vested by reason of

a lawfully executed grant or contract, impose a succession tax on account of the transfer.—*Hunt v. Wicht*, 174 Cal. 205, L. R. A. 1917C, 961, 162 Pac. 639.

4. Constitutionality of acts.

(1) *In general*.—A collateral-inheritance tax law, which imposes a tax on the privilege of receiving property by will or inheritance, does not change the law of descent.—*In re Magnes' Estate*, 32 Colo. 527, 77 Pac. 853, 857. The inheritance tax law of the territory of Hawaii (Act 102, S. L. 1905), is not unconstitutional by reason of discrimination or lack of uniform protection.—*Brown v. Treasurer*, 20 Haw. 41. A tax on inheritance is a tax on the transitus of the property and not upon the property itself, and the act of May 26, 1908 (Laws of Oklahoma, of 1908, chap. 81), is not unconstitutional.—*McGannon v. State*, 33 Okla. 145, Ann. Cas. 1914B, 620, 124 Pac. 1063. The material parts of the statutes of the several states relative to inheritance tax are the same, in effect, as those of Colorado, and although the New York and New Jersey statutes designate the tax as a "transfer tax" they also say that "transfer," as used, shall be taken to include the passing of property by descent, devise, bequest, etc., thus making those statutes the same as those of Colorado.—*People v. Palmer's Estate*, 25 Colo. App. 450, 139 Pac. 555.

REFERENCES.

Constitutionality of succession taxes.—33 L. R. A. (N. S.) 592, 50 L. R. A. (N. S.) 991. Constitutionality of laws affecting taxation of collateral inheritances.—See note 41 Am. St. Rep. 580-585. Constitutionality of succession taxes.—See notes 1 Am. & Eng. Ann. Cas. 30, 6 Am. & Eng. Ann. Cas. 579, 7 Am. & Eng. Ann. Cas. 1061, 8 Am. & Eng. Ann. Cas. 159. A statute which imposes an inheritance tax upon foreign corporations is constitutional.—See *Annotations to Henning's General Laws*, p. 148.

(2) *Due process of law*.—A collateral-inheritance tax law which creates a vested right in the state, upon the death of decedent, is not unconstitutional as depriving the heirs of property "without due process of law," contrary to the fourteenth amendment of the constitution of the United States.—*Trippet v. State*, 149 Cal. 521, 529, 8 L. R. A. (N. S.) 1210, 86 Pac. 1084; *Estate of Stanford*, 126 Cal. 112, 45 L. R. A. 788, 54 Pac. 259, 58 Pac. 462; *Estate of Campbell*, 143 Cal. 623, 625, 77 Pac. 674. Section 7738 and 7741 of the Revised Codes of Montana, forming a part of the inheritance tax law, provide for reasonable notice to non-resident distributees of the appraisement of the estate for the purposes of fixing the inheritance tax, and also provide for an opportunity to be heard; the legislation is not, therefore, open to the objection that it fails to provide "due process of law."—*State v. District Court*, 41 Mont. 357, 367, 109 Pac. 438.

(3) *Uniformity of taxation*.—A collateral-inheritance tax law which provides for an inheritance tax, of a certain percentage, where the

property passes to direct heirs, and for greater percentages where it passes to collateral heirs or strangers to the blood, is not unconstitutional as violating that provision requiring the taxation of property to be uniform.—*State v. Clark*, 30 Wash. 439, 71 Pac. 20, 22. The state may tax privileges, discriminate between relatives, and grant exemptions, and is not precluded from this power by the provisions of the respective state constitutions requiring uniformity of taxation. Hence an inheritance tax on the privilege of receiving property by will or inheritance does not violate the constitutional provision requiring uniform taxation.—*In re Magnes' Estate*, 32 Colo. 527, 77 Pac. 853, 855. Nor does such a tax contravene the constitution as limiting the rate of taxation on property for state purposes.—*In re Magnes' Estate*, 32 Colo. 527, 77 Pac. 853, 855, 856; *Dickson v. Ricketts*, 26 Utah 215, 72 Pac. 947. A law which imposes a collateral-inheritance tax on all the property in excess of \$10,000, after the payment of debts, does not mean that the tax is to be imposed only on separate portions of the decedent's estate, or any distributive share thereof, exceeding \$10,000, after payment of the indebtedness. The tax authorized by said act should be imposed, by right of devolution and succession, in respect to the whole estate of the decedent above the value of \$10,000, after payment of the indebtedness of the estate. It follows that, where the estate is over the value of \$10,000, after payment of the indebtedness of the estate, the estate could not evade the payment of the tax on the ground that it is not shown that any legatee would receive that sum.—*Dickson v. Ricketts*, 26 Utah 215, 72 Pac. 947. Upon appeal from an order of the superior court directing a widow, as sole devisee of her deceased husband, to pay the "inheritance tax" under the act approved March 20, 1905, the contention that such tax makes an unjust discrimination between citizens of this state and citizens of other states, in violation of the fourteenth amendment to the federal constitution, is not involved, when it can not be determined that the appellant is an aggrieved party. It is only when a non-resident of the state assails the validity of the law on that ground that this question will be decided. The validity of the inheritance tax in question has been repeatedly upheld by the supreme court of this state.—*Estate of Damon*, 10 Cal. App. 542, 102 Pac. 684. The inheritance tax of Kansas (Chapter 248 of the laws of 1909) does not violate that clause in the bill of rights declaring that free governments are instituted for equal protection and benefit and is not in conflict with the constitutional provisions respecting uniformity in the operation of general laws and uniformity and equality in the rates of assessment and taxation, and is therefore held valid.—*State v. Cline*, 91 Kan. 416, 50 L. R. A. (N. S.) 991, 137 Pac. 936.

(4) *Same. Discrimination.*—A collateral-inheritance tax law exempting nephews and nieces of the deceased, not resident of this state, is constitutional and valid. It does not violate that section of the constitution of the United States, which provides "that the citizens

of each state shall be entitled to all the privileges and immunities of the citizens of the several states"; though the intention of the legislature, in the law, to leave the tax resting upon non-resident nephews and nieces, is just as clearly manifest as their intention to relieve resident nephews and nieces.—Estate of Johnson, 139 Cal. 532, 537, 96 Am. St. Rep. 161, 73 Pac. 424, overruling Estate of Mahoney, 133 Cal. 180, 85 Am. St. Rep. 155, 65 Pac. 389, on this point. An amendment to a collateral-inheritance tax law, which attempts, retroactively, to exempt resident nieces and nephews, along with certain classes of corporations, from the payment of unpaid taxes upon collateral inheritance, bequests, and devises, makes an unjust discrimination, and violates the constitutional provision forbidding special legislation, releasing any existing obligation to the state, and violates the provision prohibiting donations and gifts from the state to any individual or corporation.—Estate of Stanford, 126 Cal. 112, 116, 120, 45 L. R. A. 788, 54 Pac. 259, 58 Pac. 462. A law imposing a collateral-inheritance tax upon the brothers and sisters of deceased persons, while at the same time exempting from taxation the wife of a son, the widow of a son, and the husband of a daughter, is not unconstitutional as making an unlawful discrimination between brothers and sisters and other parties mentioned in the act. Where the statute imposes an inheritance tax upon all the collateral relations of the deceased, and exempts from taxation the father, mother, husband, wife, lawful issue, and adopted children, and any lineal descendant of deceased born in lawful wedlock, the distinction as to inheritances between those in the direct line and collateral relations is a natural distinction, and is sufficient to justify the legislature in imposing a different rule on this subject with respect to each. Where the statute also exempts the wife or widow of a son, and the husband of a daughter, who are strangers to the blood, and who, under the statute of succession, do not inherit, the exemption in these latter cases can apply only to bequests and devises. The class composed of sons-in-law and daughters-in-law, though not of the blood of the testator, are very closely related by affinity; and a court will not interfere with the legislative discretion, and say that the distinction is not natural. It is sufficient, at least, to justify the legislature in exempting these persons from the tax.—Estate of Campbell, 143 Cal. 623, 627, 77 Pac. 674. Nor is such a law unconstitutional because it imposes a tax upon bequests and devises to persons not of kin to the testator; that is, upon all persons strangers to the blood other than the wife or widow of the son or husband of the daughter, and that these classes of persons, upon whom the tax is thus imposed, are not embraced within the terms of the title of the act.—Estate of Campbell, 143 Cal. 623, 628, 77 Pac. 674.

REFERENCES.

Discrimination.—See subd. 7, post. Constitutionality of succession taxes, discussing discrimination between relatives.—See note 33 L. R. A.

(N. S.) 593. Inheritance taxation, its leading features.—See note 127 Am. St. Rep. 1035.

(5) Title of act.—A collateral-inheritance tax law will not be pronounced unconstitutional on the ground that the body of the act, because of a mere clerical error, does not conform to the title, where it is manifest that the defect complained of is not in the title, but in the body of the act. If the act can be given construction which is reasonable, and which will make it constitutional, that construction must prevail.—Estate of Campbell, 143 Cal. 623, 77 Pac. 674. Nor is such a law unconstitutional because it contains a provision imposing taxes upon property transferred by deed, grant, sale, or gift, made to take effect in possession or enjoyment after the death of the decedent, and that this class of dispositions of property is not expressed in the title of the act.—Estate of Campbell, 143 Cal. 623, 629, 77 Pac. 674. In revenue laws, the term "inheritance tax" is almost universally employed to designate or describe a tax on the right of succession, whether by operation of law, by will, or by grant; and the title of an act entitled, "an act relating to the taxation of inheritances and providing for disposition of same," is broad enough to sustain the provision imposing a tax upon property which passes by will, or otherwise than by operation of law.—In re White's Estate, 42 Wash. 360, 84 Pac. 831, 832.

(6) Revision of act, or amendment of section.—A collateral-inheritance tax law is not unconstitutional as violating that section of the constitution which provides that an act revised, or a section amended, must be re-enacted and published at length as revised or amended, though the title of the act indicates that it is an amendment to an entire act, but, in fact, the amendment made is all comprised in a single section thereof. In such a case, it is not necessary to republish the entire act. It is a sufficient compliance with the constitutional requirement, if the section which is amended is republished at length as amended.—Estate of Campbell, 143 Cal. 623, 627, 77 Pac. 674.

5. Construction of acts.

(1) In general.—It is the general doctrine that a succession tax is construed strictly against the government and in favor of the taxpayer. A succession tax is a special tax, and where the question is involved in doubt, the doubt should be resolved in favor of the taxpayer and against the taxing power.—People v. Koenig, 37 Colo. 283, 85 Pac. 1129, 1130. A collateral-inheritance tax law, relating to "collateral inheritances, bequests, and devises," only, must be limited to the subjects thus described, and would exclude successions or bequests to children or grandchildren, either adopted or natural; for clearly they are not collateral, but in a direct line.—Estate of Winchester, 140 Cal. 468, 74 Pac. 10, 11. The rule that a tax law is to be construed strictly extends to exemptions as well as impositions; and a strict construction should be indulged against a rule of exemption that is unequal

and unjust.—Estate of Bull, 153 Cal. 715, 96 Pac. 366. Older statutes must be read in the light of later legislative enactments, and are subordinated thereto and must be harmonized therewith; otherwise, they must give way to later enactments and may be repealed by implication; this rule is applicable to inheritance tax statutes.—In re Estate of Moseley, State v. Nagle, 100 Kan. 495, 499, L. R. A. 1917E, 1160, 164 Pac. 1073, 1074. The repeal of an inheritance tax act does not relieve the probate court or the executor of an estate of any unperformed duty imposed thereby.—In re Estate of Moseley, State v. Nagle, 100 Kan. 495, 496, L. R. A. 1917E, 1160, 164 Pac. 1073. Where a statute is open to either construction, one prescribing the exaction of an inheritance tax upon the same property in two jurisdictions should be favored over one having the contrary effect.—State (ex rel. Dawson) v. Davis, 88 Kan. 849, Ann. Cas. 1914B, 688, 129 Pac. 1197. A statute requiring certain public officials to commence proceedings to collect certain money due the state within six months after the same becomes payable is not a statute of limitations in favor of the debtor, by the invocation of which the claim may be defeated; but is merely a legislative direction to those officers.—In re Estate of Moseley, State v. Nagle, 100 Kan. 495, 497, L. R. A. 1917E, 1160, 164 Pac. 1073.

REFERENCES.

For reference to statutes which it is assumed the California inheritance tax law of March 20, 1905, fully supersedes.—See Annotations to Henning's General Laws, page 148. For reference to decisions concerning the inheritance-tax laws of Illinois, Iowa, Maine, New York, and Ohio.—See Annotations to Henning's General Laws, page 148. Succession or inheritance tax.—See notes 2 L. R. A. 826, 12 L. R. A. 402. Time for taxing future estates under succession-tax acts.—See note 5 Am. & Eng. Ann. Cas. 237. Situs of decedent's personal property for purposes of taxation.—See note 1 Am. & Eng. Ann. Cas. 438. Inheritance tax, retrospective operation.—See note 44 L. R. A. (N. S.) 419.

(2) Inheritance and taxes. Distinction.—There is no necessary connection between inheritance and taxes, and the legislature, in making laws relating to these two subjects, is not required to consider them together. Having plenary authority in reference to each, it is not required to shape its legislation concerning one in the form or with any regard to the manner in which it has shaped it concerning the other; and the fact that, in making provisions for succession, it has placed relatives of different degrees to the deceased, in the same class of successors, does not require it to observe the same classification in legislating for a purpose entirely distinct from inheritance.—Estate of Wilmerding, 117 Cal. 281, 286, 287, 49 Pac. 181. A collateral-inheritance tax is not one of the expenses of administration, or a charge on the general estate of a decedent, but is in the nature of an impost tax, or tax upon the right of succession, and is imposed on the several amounts of the decedent's estate to which the successors thereto are respectively entitled. The tax is computed, not on the aggregate valu-

ation of the whole of the estate of the decedent, considered as the unit for taxation, but on the value of the separate interests into which it is divided by the will, or by the statute laws of the state, and is a charge on each share or interest, according to its value, and against the person entitled thereto.—Estate of Chesney, 1 Cal. App. 30, 33, 81 Pac. 679. All courts and all governments conceive that the transmission of property occasioned by death, although differing from tax on property as such, is nevertheless a usual subject of taxation. It is the privilege of succeeding to or inheriting the property and not the property itself, which is taxed. In the consideration of this subject the distinction between an inheritance tax as such and a property tax as such must at all times be kept in view. The inheritance tax law of South Dakota is not in conflict with section 17, article 6 of the constitution of that state.—In re McKennan's Estate, 25 S. D. 369, 33 L. R. A. (N. S.) 606, 126 N. W. 611, 27 S. D. 139, Ann. Cas. 1913D, 745, 33 L. R. A. (N. S.) 620, 130 N. W. 33.

(3) **Reciprocal statutes.**—It is provided by the statutes of some of the states that the inheritance tax is to be collected only in case the statutes of the state where a non-resident lives have the same provisions, thus recognizing a kind of reciprocity.—People v. Palmer's Estate, 25 Colo. App. 450, 139 Pac. 555.

(4) **Double taxation.**—The payment of the inheritance tax of the states of New York and New Jersey is upon the same footing as the payment of the inheritance tax of the state of Colorado, and merely increases the tax the legatees have to pay for the privilege of succeeding to the property that passes under the law to them. So long as other states as well as the state of Colorado require an inheritance tax to be paid upon personal property located therein, while the decedent and beneficiary reside in a different state, and must pay the same kind of a tax there and the courts continue to uphold such species of double taxation, then just so long will it be the duty of the courts to hold that the payment in one state is on the same basis as the payment in another, and if the tax be not deducted in the state where the principal administration is made before appraisement and computation, then the same kind of a tax paid in another state can not be deducted. The wisdom of such legislation is with the law making power and not with the courts.—People v. Palmer's Estate, 25 Colo. App. 450, 139 Pac. 556. By the imposition of an inheritance tax upon personal property of a decedent under the principle of *mobilia sequuntur personam*, and a like imposition in the state of the actual location of the property there is no principle of constitutional law violated as constituting double taxation.—Estate of Hodges, 170 Cal. 492, L. R. A. 1916A, 837, 150 Pac. 344.

6. Property subject to tax.

(1) **In general.**—It is only property that has passed by will or descent that is charged with the inheritance tax, and it is upon those

who succeed to the beneficial interests that the burden is cast.—*In re Macky's Estate*, 46 Colo. 79, 23 L. R. A. (N. S.) 1207, 102 Pac. 1078. All property of a person dying within the state of California, a resident thereof, whether he dies testate or intestate, is subject to the payment of an inheritance tax to that state, and the property subject to the tax includes all personal property of such person within or without the state.—*Estate of Hodges*, 170 Cal. 492, L. R. A. 1916A, 837, 150 Pac. 344. The inheritance tax is imposed solely upon the devisee, legatee, or heir, and upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir.—*Estate of Williams*, 17 Cal. App. 595, 137 Pac. 1067. Property passing by virtue and force of law governing testate or intestate succession is liable to the tax.—*In re Kennedy's Estate*, 157 Cal. 517, 29 L. R. A. (N. S.) 428, 108 Pac. 280. Transfer taxes upon inheritances are collectable only in cases where property has passed, by will, or by operation of the state intestate laws, from persons dying, seised, or possessed of the same while residents of the state; or, as to property of persons dying who were not residents, where this property or any part of it is within the state.—*State (ex rel. Peterson) v. Dunlap*, 28 Ida. 784, Ann. Cas. 1918A, 546, 156 Pac. 1141. The expression, "increase of all property," in an inheritance tax law, which provides that the tax shall be levied and collected upon the increase of all property arising between the date of death and the date of the decree of distribution, includes augmentation in value as well as multiplication in kind. The intention of such a statute is to make the imposition apply to the increase of all property of whatever kind and description; this rule applies to property consisting of lode mining claims.—*Estate of Tuohy*, 35 Mont. 431, 90 Pac. 170, 173. An inheritance tax may be levied by the state on the personal property of a resident who has happened to die in another state, and notwithstanding that such property was located in that state at the time of the death and has been administered upon in that state.—*Estate of Hodges*, 170 Cal. 492, L. R. A. 1916A, 837, 150 Pac. 344. The statute of Colorado provides that the state may collect the inheritance on personal property located in that state although the decedent may have lived and died in another state where a similar tax existed and a similar provision obtains in New York and New Jersey.—*People v. Palmer's Estate*, 25 Colo. App. 450, 139 Pac. 555. Bequests to a city and county for a hospital and to the regents of a state university for an auditorium being bequests to subdivisions of the state in the exercise of governmental duties are not subject to an inheritance tax under the general rule that the property of the state or of its governmental agencies is not subject to taxation.—*In re Macky's Estate*, 46 Colo. 79, 23 L. R. A. (N. S.) 1207, 102 Pac. 1082. If a holder of capital stock in a corporation transfers the shares to another irrevocably, but for a mere nominal consideration and under a stipulation that the dividends are to be handed over to him as long as he lives, the shares are taxable, under the inheritance tax law, on

such holder's death.—Estate of Felton, 176 Cal. 663, 169 Pac. 392. The Hawaiian act of 1909, imposing an inheritance tax upon all property which shall pass by will, or by the intestate laws, from any person who may die seised of the same, or shall be transferred by deed, grant, sale, or gift, made in contemplation of the death of the grantor, vendor, or bargainor, applies to the case of property for which a testatrix under power of appointment given by the will of her deceased husband, has named the recipients.—Robinson v. McCarthy, Treasurer, 22 Haw. 742, 747. No vested interest in a life estate accrued to a married woman, beneficiary under a legacy in trust, to pay to her the income from \$14,872.26 during her life and thereafter to pay the principal to her children, unless she ceased to be the wife of her present husband, in which case she was to be paid the principal; and the legacy was not subject to be taxed as such a vested interest, under the federal law existing at the time.—Muentert v. Bliss (Cal.), 208 Fed. 140, 125 C. C. A. 598. Where the niece of a Catholic priest lived with him as housekeeper for over 20 years under promise by him that on his death he would leave her all his property by will, a will so made is not a contract, but a testamentary disposition subjecting the beneficiary to the inheritance tax.—State v. Mollier, 96 Kan. 514, L. R. A. 1916C, 551, 152 Pac. 771. The one-third portion of a man's estate which, on his death, is, under the statute, taken by the widow, is the latter's absolutely and regarded in law as having been so even during her husband's lifetime, except for his having the exclusive management of it; since, therefore, it does not come to her through devise, bequest, descent, or inheritance, it is not subject to an inheritance tax.—Estate of Bullen, 47 Utah 96, L. R. A. 1916A, 1140, 151 Pac. 533. A provision for his widow, made by a man by will, does not, on her accepting the same in lieu of dower, escape subjection to the inheritance tax, even to an extent equal to what the dower would amount to, although dower itself is not taxable.—In re Osgood's Estate (Utah), 178 Pac. 152.

REFERENCES.

Property and transfers subject to an inheritance tax.—See note 127 Am. St. Rep. 1059. Widow's dower, support, etc., as subject to a succession tax.—See note Ann. Cas. 1913A, 167. Collateral-inheritance tax; land in other states.—See note 1 L. R. A. (N. S.) 400. Succession tax on money paid in compromise of contest of will.—See note 6 Am. & Eng. Ann. Cas. 572. Liability of transfer of United States and other governmental bonds or securities to succession tax.—See note 5 Am. & Eng. Ann. Cas. 874. Inheritance tax on dower, curtesy, statutory homestead, or allowances.—See note 29 L. R. A. (N. S.) 428, 34 L. R. A. (N. S.) 1161. Succession tax upon provision in lieu of dower.—See note 33 L. R. A. (N. S.) 230, 45 L. R. A. (N. S.) 228. Effect of fact that property otherwise exempt from taxation is devoted to purposes of a particular society.—See note 26 L. R. A. (N. S.) 696. Inheritance tax on gift in contemplation of death.—See note 18 L. R. A. (N. S.) 458-

461, 46 L. R. A. (N. S.) 790. Applicability of inheritance tax to property conveyed in consideration of support of grantor during his life.—18 L. R. A. (N. S.) 226, 227. Payment of inheritance tax on money or property of estate, which has been lost or misappropriated since decedent's death.—See note 32 L. R. A. (N. S.) 1167. Physical presence or absence of personal property, or evidence thereof, as affecting liability to tax.—See note 46 L. R. A. (N. S.) 1167.

(2) **Property of non-residents.**—Under the inheritance tax statute of the Territory of Hawaii shares of stock in domestic corporations, owned by a non-resident decedent, are property within that territory and subject to the provisions of the act.—*Estate of Hall*, 19 Haw. 531. Probate in the state of California, either ancillary or otherwise, is not essential to the imposition of the state inheritance tax upon the stock of a local corporation issued to a non-resident who has since died in the state of his residence and whose estate has been settled there, and where an inheritance tax has already been imposed there.—*McDougal v. Lillenthal*, 174 Cal. 698, 164 Pac. 387. The state of California may impose an inheritance tax upon capital stock of a California corporation, owned by a resident of New York who has died there, although the certificate may have been kept in that state, the estate settled there and the stock distributed to New York residents and subjected to the New York inheritance tax.—*McDougal v. Lillenthal*, 174 Cal. 698, 701, 164 Pac. 387. The act of 1915 repealing the then existing inheritance tax law, so far as it applied to shares of stock in Kansas corporations held by persons resident in other states at the time of their dying, was intended to operate prospectively.—*State v. United States Trust Co.*, 99 Kan. 841, L. R. A. 1917C, 1034, 163 Pac. 156. The act of 1915, amending the law imposing a tax on inheritances, gifts, etc., exempted foreign charitable corporations from the duty of paying such tax.—*Estate of Fiske*, *Chambers v. Princeton University*, 178 Cal. 116, 172 Pac. 390. If bonds are unregistered, they pass upon delivery just like money; their situs is the domicile of the owner, and they are taxable there, except when such owner is a non-resident and such property is not in his custody, but is physically present in the state proposing to levy the tax; hence, where a non-resident of Colorado died in New York, owning unregistered bonds of a Colorado corporation, such bonds are not taxable under the Inheritance Tax Law of Colorado, though they are secured by a mortgage on real property in the state last named.—*Walker v. People (Colo.)*, 171 Pac. 747. If a non-resident in ill health, coming into the state and habitually bringing his securities with him, happens, when at last his illness takes him home suddenly, to forget to take them with him, and dies on reaching home, the securities are not subject to an inheritance tax in this state.—*Estate of McCahill*, 171 Cal. 482, 153 Pac. 930. A man of wealth who has lived for 20 years in a distant state, having there a stock farm, which he maintains as his home, with many servants in attendance, does not become a resident of California merely because he visited a

daughter living in that state and died there during one of his visits.—Estate of Harkness, 176 Cal. 537, 169 Pac. 78. Inasmuch as the right of the authorities of one state to tax property in its jurisdiction, subject to taxation, can not and does not depend on the action of the taxing power of any other state, it is immaterial that property of a non-resident testator was not assessed at his domicile.—In re Thourot's Estate (Utah), 172 Pac. 697.

REFERENCES.

Taxation of inheritances.—Ross on Inheritance Taxation. Apportioning property of non-resident decedent within the state to payment of debts or legacies which are exempt or subject to a reduced rate.—See note 18 L. R. A. (N. S.) 946, 947. Liability to pay inheritance tax in respect of stock in a domestic corporation belonging to the estate of a non-resident.—See 19 L. R. A. (N. S.) 887-890, 25 L. R. A. (N. S.) 384. Validity of discrimination against aliens by inheritance tax law as affected by treaty with foreign government.—See note 33 L. R. A. (N. S.) 632, L. R. A. 1916A, 474. Debt due to non-resident secured by mortgage upon land within the state is subject of inheritance tax.—See note 35 L. R. A. (N. S.) 784.

(3) Conveyances.—The character of the transaction is not wholly determined by the terms of the written instrument, in an inquiry as to liability for an inheritance tax; but parol evidence of the real agreement is permitted with a latitude similar to that indulged to show a resulting trust or to transform a deed absolute on its face into a mortgage.—Kelly v. Woolsey, 177 Cal. 325, 170 Pac. 837, 838. The inheritance tax is not exacted in a case where the plain bona fide intent of the conveyance, made by the person who has died, was that, regardless of when or whether such person, the grantor, should die, the person taking was to have absolute dominion over the property; in other cases, the tax is exacted.—Kelly v. Woolsey, 177 Cal. 325, 170 Pac. 837. If, underlying the conveyance, there is the plain intention that the person taking shall have absolute dominion over the property, regardless of the maker's living or dying, the mere fact that the latter is, as a consideration for the conveyance, to be supported during his life by the taker does not bring the transaction under the inheritance tax law.—Kelly v. Woolsey, 177 Cal. 325, 170 Pac. 837. A deed which conveys absolutely, by force of the terms used early in the instrument, and further on uses words the effect of which is to restrict the estate in the hands of the grantee, is to be construed as conveying the title in the restricted shape.—Estate of Aldersley, 174 Cal. 366, 163 Pac. 206. Where a grantor intends that the deed executed by him shall operate as a present transfer of title and delivers it to a third person without condition, the title passes as of the date of delivery to such third person, although the deed is not actually delivered to the grantee until after the grantor's death.—Kelly v. Woolsey, 177 Cal. 325, 170 Pac. 837, 841. A man executed and delivered

to his wife, virtually in contemplation of death, deeds conveying his property to her, but, inasmuch as the deeds were to take effect on delivery, the transfer was valid and not subject to the inheritance tax law.—*McDougald v. Wulzen*, 34 Cal. App. 21, 166 Pac. 1033. A grant without any actual delivery is constructively delivered where it is delivered to a stranger for the benefit of the grantee, and his assent is shown or may be presumed.—*Kelly v. Woolsey*, 177 Cal. 325, 170 Pac. 837, 841. The mere fact that the transferor remains in possession and enjoyment by sufferance, or at the request of the transferee, does not necessarily establish an intent or agreement that the transferor should have the possession and enjoyment of the property for life, or for any period whatever, where there are facts and circumstances justifying a reasonable inference that there was no such intent.—*Kelly v. Woolsey*, 177 Cal. 325, 170 Pac. 837, 840. Evidence examined, and the finding of the court that there was no intent to evade the payment of the tax, or to defraud the state, and no intent to postpone the passing of the title, or absolute control of the property, or to restrict the grantee's use and enjoyment thereof, sustained.—*Kelly v. Woolsey*, 177 Cal. 325, 170 Pac. 837, 838. Where property is conveyed in consideration of the support of the grantor by the grantee during the former's life, if a present title is conveyed, if the property passes in possession and enjoyment as of the date of the conveyance, no intention to evade the tax appearing, the transfer is not taxable as having been made in contemplation of death or to take effect at or after death, and this although the deed is withheld from record until the grantor's death.—*Kelly v. Woolsey*, 177 Cal. 325, 170 Pac. 837, 838. If the conveyance is absolute otherwise, so that the grantee takes immediately, the grantor relinquishing all dominion over the property, it is immaterial that as a part of the transaction the grantee undertook to support the grantor during the latter's lifetime.—*Kelly v. Woolsey*, 177 Cal. 325, 170 Pac. 837. A deed, made without adequate consideration, by a man of eighty, very feeble and suffering from Bright's disease and sclerosis, both known by him to be incurable, is a gift in contemplation of death, and subjects the property to the inheritance tax.—*Abstract & T. G. Co. v. State*, 173 Cal. 691, 161 Pac. 264. A deed may be one of gift notwithstanding that it names a consideration of ten dollars, provides for the grantee's assuming a mortgage indebtedness, and subjects the grantees to the burden of the grantor's support during the rest of his life.—*Abstract & T. G. Co. v. State*, 173 Cal. 691, 161 Pac. 264. The grantee may have allowed the grantor to remain on the property after the transfer, and yet, if the latter was in good faith intended to be absolute as of the time of the transaction, the inheritance tax law may not apply.—*Kelly v. Woolsey*, 177 Cal. 325, 170 Pac. 837.

(4) Same. In contemplation of death.—The inheritance tax law, exacting a tax on property conveyed in contemplation of the grantor's death or with intent that it take effect in possession or enjoyment

after his death, looks to the substance rather than to the form.—*Kelly v. Woolsey*, 177 Cal. 325, 170 Pac. 837. In determining whether any transfer was made in contemplation of the death of the grantor, the inheritance tax law of 1905 looks to the substance rather than the form of the transaction, and payment of the tax can only be defeated or avoided by such a bona fide conveyance as parts absolutely with the possession and enjoyment in the grantor's lifetime.—*Kelly v. Woolsey*, 177 Cal. 325, 170 Pac. 837, 838. The fact that a grantor conveyed certain property by deed to take effect after death is not evidence of a similar intent as to another conveyance of other property to another grantee made on the same date, the circumstances being materially different.—*Kelly v. Woolsey*, 177 Cal. 325, 170 Pac. 837, 842. Under the inheritance tax law of 1905, it is a question of fact, rather than of law, whether a transfer was made "in contemplation of death" or "intended to take effect in possession or enjoyment after the death" of the donor.—*Spreckels v. State*, 30 Cal. App. 363, 158 Pac. 549. "In contemplation of death," as the expression is used in section 27 of the Inheritance Tax Act, as amended by the Laws of 1911, page 726, signifies that expectancy of death which actuates the mind of a person in making a gift causa mortis.—*In re Minor's Estate (Cal.)*, 4 A. L. R. 456, 180 Pac. 813. The inheritance tax law prescribes the imposition of a tax on the transfer of any property real, personal, or mixed, "when the transfer is of property made by a resident, or by a non-resident when such non-resident's property is within this state, by deed, grant, bargain, sale, assignment, or gift in contemplation of the death of the grantor, vendor, assignor, or donor, or intended to take effect in possession or enjoyment at or after such death."—*In re Minor's Estate (Cal.)*, 4 A. L. R. 456, 180 Pac. 813. A deed made by a man (in contemplation of death) in favor of his wife, the execution being on the 12th of April, 1905, but the instrument being intended to be held in escrow until his death, was not invalid, provided the plain intention was that the grantor's dominion over the property ceased when the execution was effected. Such a transaction, if the deed had been made on or after July 1, 1905, would be, however, subject to the inheritance tax; but on April 12, 1905, the act of 1893 prevailed, whereby a transfer to a wife was excepted from the operation of the tax.—*Hunt v. Wicht*, 174 Cal. 205, L. R. A. 1917C, 961, 162 Pac. 639. As used in the Inheritance Tax Law, the phrase "in contemplation of death" does not mean that general expectation of death which is the essential concomitant of the inherent knowledge of the inevitable termination of all life, and which is in the young and physically robust as well as in the aged and infirm; within the meaning of that law, it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death, where the expectation of death is the direct, specific, and immediate animating cause of the transfer, that such transfer is subject to the burden of an inheritance tax.—*Spreckels v. State*, 30 Cal. App. 363, 158 Pac. 549. The inheritance

tax law of 1905, also that of 1911, the intention of which was to clarify rather than to change the older law, imposes a tax upon the "transfer of any property, real, personal, or mixed, by deed, grant, bargain, sale, assignment, or gift, made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor, or donor, or intended to take effect in possession or enjoyment at or after such death." A gratuitous transfer, to his wife and son, by a man who has submitted to repeated surgical operations, more and more severe, for a malignant tumor, and is now on the eve of submitting to a last desperate one, is to be regarded as a transfer in contemplation of death.—Estate of Reynolds, 169 Cal. 600, 147 Pac. 268.

REFERENCES.

Inheritance tax on conveyance to take effect after grantor's death.—See note 38 L. R. A. (N. S.) 1139.

(5) Community property.—The wife is not liable to pay, upon the death of her husband, an inheritance tax on her one-half of the community property; it does not pass to her "by will or by the intestate laws of this state."—Kohny v. Dunbar, 21 Ida. 258, 269, Ann. Cas. 1913D, 492, 39 L. R. A. (N. S.) 1107, 121 Pac. 544. The surviving wife's share of the community property was held to be subject to an inheritance tax, under the California statute of 1905, upon the theory that she took as heir and not as survivor.—Estate of Moffitt, 153 Cal. 359, 20 L. R. A. (N. S.) 207, 95 Pac. 653, 654. Interest of wife in community property is not subject to taxation under the inheritance tax laws.—In re Williams' Estate, 40 Nev. 241, 257, L. R. A. 1917C, 602, 161 Pac. 741, 742.

REFERENCES.

Community property as subject to inheritance tax.—See note Ann. Cas. 1913D, 496, 20 L. R. A. (N. S.) 208, 39 L. R. A. (N. S.) 1107. Exemption of surviving spouse's share in community property from inheritance tax.—See § 331, ante.

(6) Homesteads.—Property passing by will was held not to include homestead passing by order of probate court.—In re Kennedy's Estate, 157 Cal. 517, 29 L. R. A. (N. S.) 428, 108 Pac. 280. Where a woman declares a homestead upon community property, and her husband dies thereafter, an inheritance tax is imposed upon the value of the homestead property, notwithstanding the law vesting in the widow, in such circumstances, absolute title.—Estate of Stewart, 174 Cal. 547, 163 Pac. 902. The words "transfer of title or of interest," as used in the inheritance tax law of California, include a transfer accomplished by operation of law as well as by the act of the parties; hence, homestead property, the title to which was transferred to a widow by and on the death of her husband, is subject to the inheritance tax.—In re Stewart's Estate, 174 Cal. 547, 163 Pac. 902.

(7) Joint tenancy.—The creation of a joint tenancy, in a bank deposit, is not a testamentary disposition, if, in itself, it raises no

inference or presumption that it was in contemplation of death.—*Estate of Gurnsey*, 177 Cal. 211, 170 Pac. 402. The property in the money of a joint account in a bank, belonging to a husband and wife, does not vest in the wife upon the death of the husband nor descend to her upon such death, but she was seised of the whole estate when it was created, and no change in this respect occurred upon his death, and there was no such transfer as subjected her to the payment of an inheritance tax.—*In re Gurnsey's Estate*, 177 Cal. 211, 170 Pac. 402, 404.

(8) *Exemptions*.—A collateral-inheritance tax is not unconstitutional because of the fact that it exempts inheritances less than \$500 in value. The tax being not upon property, but upon the right of succession, the constitutional provision that all property shall be taxed according to its value is inapplicable.—*Estate of Wilmerding*, 117 Cal. 281, 49 Pac. 181, 183. Neither is a collateral-inheritance tax law unconstitutional as violating the rule requiring equality in taxation because of the exemption of \$10,000 in value from the portion of the estate devised to direct heirs, which exemption is not extended to collateral heirs or strangers to the blood.—*State v. Clark*, 30 Wash. 439, 71 Pac. 20, 23; *Dickson v. Ricketts*, 26 Utah 215, 72 Pac. 947. In determining the question what property is subject to the inheritance tax imposed by the California act of March 20, 1905 (Stats. 1905, page 341), as distinguished from the statutory exemption created thereby, the all important section thereof to be considered is section 1, which imposes the tax and limits it to "property which shall pass by will or by intestate laws of this state," from a deceased resident of this state "to any person or persons," etc., property not "so passing" is not "subject to taxation" and no question of "exemption" is involved in determining that question.—*Estate of Kennedy*, 157 Cal. 517, 29 L. R. A. (N. S.) 428, 108 Pac. 280. Under section 7724 of the Revised Codes of Montana, an estate valued at less than "seventy-five hundred dollars," distributable, among others, to brothers and sisters, is exempt; but such exemption is to be construed as referring to the clear value of the estate; not to the distributive shares.—*State v. District Court*, 45 Mont. 335, 341, Ann. Cas. 1914A, 469, 122 Pac. 922. A probate homestead is not property passing by will and is exempt from the tax.—*In re Kennedy's Estate*, 157 Cal. 517, 29 L. R. A. (N. S.) 428, 108 Pac. 280.

REFERENCES.

Exemption clauses of succession-tax statutes are constitutional.—See note 1 Am. & Eng. Ann. Cas. 30. Exemption of adopted children from succession tax.—See note 12 L. R. A. 404, 405. Applicability of general tax exemptions to inheritance or succession taxes.—See note 48 L. R. A. (N. S.) 373. Whether property out of state must be included in fixing exemptions under inheritance tax.—See note 39 L. R. A. (N. S.) 1024.

7. Discrimination.

(1) *In general.*—Court declines to hold as discriminatory, and therefore invalid, the provision imposing an inheritance tax of 5 per cent upon property descending to nephews and nieces, when only a 3 per cent rate is imposed upon property descending to cousins.—*Strauss v. Costello*, 29 N. D. 215, 223, 150 N. W. 874. The legislature by imposing a larger rate of taxation on the inheritance of a nephew or niece than on that of a cousin or an uncle or an aunt, did not violate the constitution of the state relative to special laws or violate the fourteenth amendment of the federal constitution.—*Strauss v. State*, 36 N. D. 594, 601, L. R. A. 1917E, 909, 162 N. W. 908.

(2) *Treaty. Non-resident alien heirs.*—The treaty of 1899, between the United States and Great Britain, renders nugatory, as to citizens and subjects of that country, the provisions of the North Dakota Inheritance Tax Law, which imposes upon non-resident aliens a larger tax than that imposed upon citizens or resident aliens; the citizens or subjects of that country are chargeable only with the same tax as that chargeable against citizens and resident aliens.—*Trott v. State*, — (N. D.) —, 171 N. W. 827. An inheritance tax law which imposes upon alien heirs of a deceased citizen of the United States a greater tax than that imposed upon such heirs if not aliens, when in violation of rights under a treaty between the United States and the country of such alien heirs, must be held in abeyance and yield to the provisions of the treaty.—*In re Stixrud's Estate*, 58 Wash. 339, Ann. Cas. 1912A, 850, 33 L. R. A. (N. S.) 632, 109 Pac. 349. The inheritance tax law whereby the inheritances of non-resident aliens are subjected to a rate differing from that imposed upon the inheritances of residents does not violate the constitutional provisions relating to special legislation, or to those relative to uniformity.—*Moody v. Hagen*, 36 N. D. 471, 483, Ann. Cas. 1918A, 933, 162 N. W. 704.

REFERENCES.

Constitutionality of discriminatory acts.—See subd. 4 (4), ante. Constitutionality of inheritance taxes that discriminate between relatives.—33 L. R. A. (N. S.) 593.

8. *What law governs.*—The law in force at the time of decedents' death governs in determining the amount of a collateral-inheritance tax to be paid by those who succeed to his estate.—*Estate of Woodard* (Cal.), 94 Pac. 242. The inheritance tax law prevailing at the time a transfer is made is the one that controls the question whether the property is subject to such a tax.—*Estate of Gurnsey*, 177 Cal. 211, 170 Pac. 402. The particular law regulating inheritance taxes in force at the time of a transfer alleged to have been in an attempted evasion of such a tax controls on such an allegation being proved.—*Nickel v. State*, 179 Cal. 126, 175 Pac. 641. The law, relating to the imposition of an inheritance tax, in force at the time of a transfer of corporate stock, made, as alleged, by the state, in contemplation of the holder's

death, is the law which controls with respect to the transaction.—*Nickel v. State*, 179 Cal. 126, 175 Pac. 641. It is the vesting in interest that constitutes the succession, and the question of liability to an inheritance tax must, in each instance, be determined by the law in force at the time such vesting takes place.—*Hunt v. Wicht*, 174 Cal. 205, L. R. A. 1917C, 961, 162 Pac. 639. The property of a person who died after the enactment of the inheritance tax law, but before its going into effect, is subject to that law, the legislature having purposed, in respect to the intervening period, to give to the public notice of its provisions, lest ingenious minds be afforded opportunity for devising schemes to evade them.—*Cole v. Nickel (Nev.)*, 177 Pac. 409. The question of liability for the payment of an inheritance tax upon a transfer of money made in 1911 must be determined by the act of 1905, in force at that time, and the act of 1913 must be disregarded.—*In re Gurnsey's Estate*, 177 Cal. 211, 170 Pac. 402, 403.

REFERENCES.

Leading features of inheritance taxation.—See note 127 Am. St. Rep. 1035.

9. Value of property and amount of tax.

(1) In general.—The right of the state to the tax accrues at the moment of death, and is measured as to any beneficiary by the value at that time of such property as then actually passes to him.—*Estate of Hite*, 159 Cal. 392, Ann. Cas. 1912C, 1014, 32 L. R. A. (N. S.) 1167, 113 Pac. 1072. In sections 7725 and 7727 of the Revised Codes of Montana there is an implication that the basis or measure for computing the amount of the inheritance tax is the value of the estate as it is made to appear by the appraisement of it in the ordinary way; this, however, is not exclusive.—*State v. District Court*, 41 Mont. 357, 364, 109 Pac. 438. Moneys paid out of an estate for family allowance are paid as though in satisfaction of a charge against the estate, and, in forming an estimate of the latter for purposes of the inheritance tax, the amount is to be taken as diminished by this and other charges.—*In re Blackburn's Estate*, 51 Mont. 234, 152 Pac. 31; *Blackburn v. State*, 51 Mont. 234, 152 Pac. 31. Where the clear value of an estate is \$10,772.27, distributable among the decedent's four brothers and sisters, it is proper for the court to order the administrator to pay a tax at the rate of one dollar per hundred upon that amount.—*State v. District Court*, 45 Mont. 335, 336, 343, Ann. Cas. 1914A, 469, 122 Pac. 922. Where the decedent, at the time of his death, was not a resident of Montana, section 7724 of the Revised Codes of that state requires the collection of an inheritance tax, the amount of which is to be ascertained by computation, using, as a base, the value of the estate, exclusive of exemptions, delivered to the executor or administrator, in accordance with the provisions of section 7675 of those codes.—*State v. District Court*, 41 Mont. 357, 364, 109 Pac. 438. The basis for the computation of an inheritance tax is the clear value of the whole estate, and not that of

each individual legacy or distributive share.—*State v. District Court*, 45 Mont. 335, 337, 341, Ann. Cas. 1914A, 469, 122 Pac. 922. The reasonableness of an inheritance tax is to be judged according to values as of the time it is fixed, that is the time of the decedent's death, and not four years after that time.—*In re Brown's Estate (Utah)*, 179 Pac. 652. The amount of the tax as to any beneficiary is to be determined according to the value of the net succession. That is, value of such property as remains for him after satisfaction of such charges and burdens as may lawfully be satisfied in due course of administration; it is only such property that can be said to actually pass to beneficiary.—*In re Hite's Estate*, 159 Cal. 392, Ann. Cas. 1912C, 1014, 32 L. R. A. (N. S.) 1167, 113 Pac. 1072. The question whether property is subject to the tax is to be determined on the conditions existing at the time of death, and the tax is to be assessed on the value of the property at that time. Subsequent appreciation or depreciation is immaterial.—*Estate of Hite*, 159 Cal. 392, Ann. Cas. 1912C, 1014, 32 L. R. A. (N. S.) 1167, 113 Pac. 1072. When the estate has increased in value between the date of the death of the testator and the date of the decree of distribution, the court may proceed, under section 7725 of the Revised Codes of Montana, to ascertain such increase.—*State v. District Court*, 41 Mont. 357, 365, 109 Pac. 438. In an investigation in the effort to fix an inheritance tax, the bases of the testimony as to value, given by a witness, are necessarily sales of neighboring properties of which such witness has personal knowledge; nevertheless, the testimony on direct examination must not make specific and express reference to this sale and that, but must be an estimate by the witness as the effect of having them all in mind and comparing them.—*Estate of Ross*, 171 Cal. 64, 151 Pac. 1138.

REFERENCES.

Liability to succession tax, as dependent upon amount of estate transferred.—See note Ann. Cas. A, 472.

(2) Appraisement.—The tax can not accrue until the death of the decedent but does accrue and is payable immediately after the death, at which time it must be appraised for such purpose, and the accruing of the tax is not postponed until the estate is settled, although payment may not be exacted until it is determined what has passed under the will or the law.—*People v. Palmer's Estate*, 25 Colo. App. 450, 139 Pac. 555. An appraiser can not be appointed by the probate court for the ascertainment of a basis for an inheritance tax assessment, except where probate proceedings are pending in the court or where the decedent has left an estate subject to probate in Idaho.—*State (ex rel. Peterson) v. Dunlap*, 28 Ida. 784, Ann. Cas. 1918A, 546, 156 Pac. 1141. Originally, section 1444 of the Code of Civil Procedure of California provided for the appointment of three appraisers, any two of whom might act, but the law was amended in 1911 so as to provide for the judge's appointing one of these three to act as inheritance tax appraiser.—*Estate of Haskins*, 170 Cal. 267, 149 Pac. 576. By the laws

of 1915, chap. 197, p. 434, it is the duty of the court in probate proceedings, when appointing the three appraisers, to select at least one of the authorized inheritance tax appraisers, and the appraisement then actually made must be made by two appraisers of whom the authorized tax inheritance appraiser thus selected must be one.—*Estate of Haskins*, 170 Cal. 267, 149 Pac. 576. The appraisers in probate report upon the character and value of all the properties of the estate, but the duty of the inheritance tax appraiser is to report upon the character and probable value of so much of the estate as is liable for the inheritance tax; and, moreover, to determine whether transfers of property have been made by the deceased of such a nature as to render the subjects of transfer liable to the inheritance tax.—*Estate of Haskins*, 170 Cal. 267, 149 Pac. 576. In making his appraisement of the market value of devised or inherited property an inheritance tax appraiser is to allow for and deduct from the value of such property all ripened liens, fixed charges, and proven debts outstanding against it.—*Estate of Williams*, 23 Cal. App. 285, 137 Pac. 1067. Appraisal must be based on the value of the property at the time of the death of the decedent and subsequent appreciation or depreciation is immaterial.—*In re Hite's Estate*, 159 Cal. 392, Ann. Cas. 1912C, 1014, 32 L. R. A. (N. S.) 1167, 113 Pac. 1072. The county court has jurisdiction to appoint a second appraiser in proceedings to ascertain an inheritance tax where the first appraisement was insufficient to enable it to make such ascertainment.—*County Court v. Watson*, 51 Colo. 405, 118 Pac. 979. A special appraisement of the estate of a decedent may be authorized to ascertain its value for the purposes of an inheritance tax when the circumstances of the case so require.—*State v. District Court*, 41 Mont. 357, 109 Pac. 441.

(3) **Assessment of corporate stock.**—In assessing, for the purposes of an inheritance tax, shares of capital stock of an ordinary corporation, the proper basis of estimate is the market value of the shares at the time of the holder's death, such value being distinct from the ratio between the number of shares assessed and the value of the property of the corporation.—*Estate of Felton*, 176 Cal. 663, 169 Pac. 392. The term "market value" has been fully defined in the following cases.—*Sacramento So. R. Co. v. Heilbron*, 156 Cal. 408, 104 Pac. 979; *Estate of Ross*, 171 Cal. 64, 151 Pac. 1138; *Bullard v. Stone*, 67 Cal. 477, 8 Pac. 17; *Estate of Felton*, 176 Cal. 663, 169 Pac. 392. In assessing, for the purposes of an inheritance tax, shares of the capital stock of a family corporation, stock of that sort never having been on the market, the property represented by the whole body of the stock must be ascertained and a proportionate value then assigned to the shares held by the decedent.—*Estate of Felton*, 176 Cal. 663, 169 Pac. 392.

(4) **Residuary estates.**—In determining the valuation of the property of an estate which passed under a will to a residuary legatee, for the purpose of fixing the amount of the inheritance tax due under the California Inheritance Tax Act of 1905 (Stats. 1905, p. 341), the value

of property which so passed to such legatee, but which by reason of its misappropriation by the executor was lost to the estate, is properly included.—*Estate of Hite*, 159 Cal. 392, Ann. Cas. 1912C, 1014, 32 L. R. A. (N. S.) 1167, 113 Pac. 1072. The residue of the estate of a person dying testate is that which remains after paying legacies, debts, and expenses of administration. No deduction is allowed for foreign debts or expenses when property in foreign state is sufficient to pay those debts and expenses.—*McDougald v. Low*, 164 Cal. 107, 127 Pac. 1027.

10. Liability for tax.

(1) **Tax is chargeable to whom.**—Under the statute, an inheritance tax is upon the transfer of property in contemplation of death; hence, if property is devised to one with a charge that he pay another a monthly sum, such tax is chargeable against the devisee and not to the annuitant.—*Estate of Brown*, 24 Haw. 443, 446. An inheritance tax, while not a debt of a testator, is properly chargeable to the beneficiaries.—*In re Lotzgesell's Estate*, 62 Wash. 352, 113 Pac. 1105, 1107. Where a husband buys and pays for property with his own money but takes the title in the name of his wife on an agreement that she is to will it to him, which she does not do, and he afterward acquires the title in his own name, he is not chargeable with an inheritance tax in respect of the property.—*Nelson v. Schoonover*, 89 Kan. 779, Ann. Cas. 1915A, 147, 132 Pac. 1185.

REFERENCES.

Application of collateral-inheritance tax to adopted children.—See note 12 L. R. A. 404, 405.

(2) **Instances of liability.**—Nephews and nieces are not liable for a collateral-inheritance tax, under the California statute.—*Estate of Johnson*, 139 Cal. 532, 540, 96 Am. St. Rep. 161, 73 Pac. 424; reversing *Estate of Mahoney*, 133 Cal. 180, 85 Am. St. Rep. 155, 65 Pac. 389. A sum of money paid by an executor to an heir, to withdraw a will contest instituted by such heir, is taxable under a law imposing a collateral-inheritance tax on property passing by will, or by the intestate laws of the state.—*People v. Rice*, 40 Colo. 508, 91 Pac. 33, 34. In Montana, real estate devised by a testator to his widow is not subject to a collateral-inheritance tax. Where the legislature, by expressly including personalty only, carefully avoided taxing real property passing to those favored by the law, the court is not authorized to insert what they omitted.—*Hinz v. Wilcox*, 24 Mont. 4, 55 Pac. 355, 357. Under the provisions of a collateral-inheritance tax law, establishing a tax upon "collateral inheritances, bequests, and devises," legacies in trust, for the benefit of the children of the adopted daughter of a deceased testator, are not subject to the tax.—*Estate of Winchester*, 140 Cal. 468, 470, 74 Pac. 10. Under a collateral-inheritance tax law, which excepts from its provisions, in addition to the father, mother, husband, wife, lawful issue, etc., "any child or children adopted as such," in conformity with law, and any "lineal descendant of such decedent born in lawful wed-

lock," legacies left to the children of an adopted child are not subject to the tax.—*Estate of Winchester*, 140 Cal. 468, 74 Pac. 10. If a resident of another state dies, leaving property in this state, an executor here, of a will probated in such other state, is not chargeable in this state with an inheritance tax on legacies to collateral heirs and strangers, paid in the former state out of the proceeds of property situated in that state.—*In re Clark's Estate*, 37 Wash. 671, 80 Pac. 267, 268. Where the statute specifically declares that the rate of tax is upon the market value of the property received by each person, and provides that the sum of \$10,000 of any such estate shall not be subject to any such duty or taxes, and that only the amount in excess of \$10,000 shall be subject to the duty or tax, the tax is not upon the whole estate, but only upon so much of it as passes to certain persons, and, although the executor is compelled to pay it, he is required to deduct it from the particular legacy or legacies, and no beneficiary is liable, except on the share he actually receives.—*People v. Koenig*, 37 Colo. 283, 11 Ann. Cas. 140, 85 Pac. 1129, 1130, 1131. Under the collateral-inheritance tax act of California, of 1893, as amended in 1899, illegitimate children made lawful heirs of a father by written acknowledgment duly executed as provided in section 1387 of the Civil Code of that state, are not collateral heirs within the title of the act, nor subject to the tax thereby imposed, whether they are or are not included within its exceptions of "lawful issue" or "any child or children lawfully adopted as such in conformity with the laws of the state of California."—*Wirringer v. Morgan*, 12 Cal. App. 26, 106 Pac. 425. The liability for the inheritance tax imposed by section 7724 of the Rev. Codes of Montana applies to all property passing by will or succession under the laws of that state, whether decedent were a resident or not, and does not depend upon distribution of the estate nor upon the amounts of the specific legacies or distributive shares.—*State v. District Court*, 41 Mont. 357, 109 Pac. 440.

REFERENCES.

Liability of foreign charitable corporations for inheritance tax on bequest to them.—See notes 1 Am. & Eng. Ann. Cas. 239, 6 Am. & Eng. Ann. Cas. 579, 8 Am. & Eng. Ann. Cas. 159.

(3) Computation of primary rates. Exemption.—In the California collateral-inheritance tax act of March 20, 1905 (Stats. 1905, p. 342, chap. 314), the legislature intended that the "primary rates" were to be computed in all cases. Section 2 of that act does not relate exclusively to estates not exceeding \$25,000.—*Estate of Bull*, 153 Cal. 715, 96 Pac. 366. In the case of estates exceeding \$25,000 in value, there is a tax imposed according to a sliding scale, on the excess over \$25,000, but the collateral-inheritance tax law of California does not exempt the first \$25,000 from the payment of such tax.—*Estate of Bull*, 153 Cal. 715, 96 Pac. 366; compare *People v. Koenig*, 37 Colo. 283, 11 Ann. Cas. 292, 85 Pac. 1129, 1130, 1131. See head-line 3, subd. (4), *supra*. In computing the amount of an inheritance tax imposed by the act of 1905 (Stats. 1905, p. 341), the amount of the exemption allowed to various classes

of persons by section 4 thereof should not be deducted from the value of the distributive shares as a whole, but should be deducted from the first \$25,000 of value thereof to which the primary rates fixed by section 2 thereof are applied. Thus, where the value of the distributive share passing to a child is \$63,000 the exemption of \$4000 should be deducted from the first \$25,000 thereof and a tax imposed upon the balance of \$21,000, at the primary rate of 1 per cent, on the next \$25,000 at the rate of $1\frac{1}{2}$ per cent, and on the balance of the distributive share at the rate of 2 per cent.—*Estate of Tirnken*, 158 Cal. 51, 109 Pac. 608. The exemption from inheritance tax under the Rev. Codes of Montana, section 7724, of all estates which may be valued at a sum less than \$7500 applies to the value of the entire estate and not to any particular part or interest in it so that any such part or interest though of less value than \$7500 is subject to the tax where the value of the entire estate exceeds that sum.—*State v. District Court*, 45 Mont. 335, Ann. Cas. 1914A, 469, 122 Pac. 924. An estate exceeding in net value \$25,000 is assessable at the rate of 3 per cent on the \$15,000 left after deducting the \$10,000 exemption, and of 5 per cent on the balance, regardless of how small that balance may be.—*In re Hone's Estate*, 50 Utah 92, 166 Pac. 990.

REFERENCES.

Basis and method of computing value of life estate or annuity for purposes of inheritance tax.—See note 46 L. R. A. (N. S.) 714.

(4) **Payment. Interest. Bond for payment.**—The law does not require that all the taxes from all beneficiaries should be paid at one time, and the payment represented in one receipt.—*Becker v. Nye*, 8 Cal. App. 129, 96 Pac. 333, 335. Under a collateral-inheritance tax law which provides that the tax shall be due, at the death of the decedent, and payable with interest at the rate of 6 per cent on the taxes until such time as they are paid, such taxes are payable on an estate passing under a will with 6 per cent interest from the time of the testator's death, notwithstanding subsequent proceedings contesting the will and other litigation, during which time it could not be determined, until after the termination of such proceedings, what rate should be paid.—*People v. Rice*, 40 Colo. 508, 91 Pac. 33, 35. The payment of an inheritance tax is in nowise dependent upon the distribution of the estate, nor upon the amount of the specific legacies or distributive shares; it is due and payable upon the value of the estate, at the death of the decedent.—*State v. District Court*, 41 Mont. 357, 364, 109 Pac. 438. A stipulation, between the parties to a controversy over the fixing of an inheritance tax, that if the decree, then entered, fixing the tax, should be affirmed the amount thereby awarded should bear a specified interest rate, holds good if the decree is merely modified.—*Chambers v. Felton*, 177 Cal. 12, 169 Pac. 662. The executor or administrator of the estate of a decedent has the duty of paying the taxes on such estate; hence, if he has notice of their being due, it is immaterial whether the assessment is made to him or the estate.—*In re Thourot's Estate* (Utah), 172

Pac. 697. Section 7729 of the Revised Codes of Montana, concerning the executor's duty to deduct the inheritance tax from a legacy, applies in cases of delayed payment, or where there is uncertainty as to the value of the property, and hence as to the amount of the tax, due to appreciation, or to the character of the interest which passes to the beneficiary, such as future contingent interests or incomes from them, referred to in section 7725 of those codes.—*State v. District Court*, 41 Mont. 357, 364, 109 Pac. 438. The statute of Colorado, as also those of other states, provides for the giving of a bond for payment of the inheritance tax in case it be not paid immediately after the death.—*People v. Palmer's Estate*, 25 Colo. App. 450, 139 Pac. 555.

11. Practice. Collection. State Controller.

(1) *Right of state.*—The state's ownership of a collateral-inheritance tax does not depend upon its payment, or possession by the state alone, but upon the right to possess it, which attached at the time of the death of deceased.—*Estate of Stanford*, 126 Cal. 112, 119, 45 L. R. A. 788, 54 Pac. 259, 58 Pac. 462. The right of the state to a collateral-inheritance tax, which vested upon the death of the decedent, can not be divested, retroactively, by the subsequent amendment and alteration of the statute under which the right of the state accrued.—*Estate of Stanford*, 126 Cal. 112, 121, 45 L. R. A. 788, 54 Pac. 259, 58 Pac. 462. The right to a collateral-inheritance tax, which became vested at the death of a decedent, can not be surrendered by a subsequent legislative act.—*Estate of Lander*, 6 Cal. App. 744, 747, 93 Pac. 202. Where a collateral-inheritance tax law creates a vested right in the state, at the time of the death of the decedent, to the tax imposed, a subsequent statute constituting a new law on the subject, and expressly repealing the old law, does not affect the right to collect taxes on the estates of persons dying before the latter act went into effect.—*Trippet v. State*, 149 Cal. 521, 8 L. R. A. (N. S.) 1210, 86 Pac. 1084, 1085. The mere fact that the right of the state to its proportion of the gift or inheritance is declared to vest prior to any appraisement, does not deprive the beneficiary or heir of any substantial right, where the law affords him the opportunity to be heard, as to the amount of the tax, before there is any actual collection or payment thereof.—*Trippet v. State*, 149 Cal. 521, 530, 8 L. R. A. (N. S.) 1210, 86 Pac. 1084. Where an act, repealing a particular feature of the inheritance tax law, expressly preserves for the state "any right which accrued" and "any duty imposed" by virtue of the law, the tax may be collected, notwithstanding the repeal, in respect to any such right or duty in existence at the time the act was passed.—*State (ex rel. Caster) v. Atchison, T. & S. F. R. Co.*, 99 Kan. 831, 163 Pac. 157.

REFERENCES.

Prospective or retrospective operation of succession-tax acts.—See notes 2 Am. & Eng. Ann. Cas. 608, 8 Am. & Eng. Ann. Cas. 218.

(2) Practice. Collection. Commission.—The practice throughout the state of California, respecting the matter of fixing a collateral-inheritance tax, has not been uniform,—some judges taking the inventory and appraisement as the basis, while others cause an appraisement to be made under the inheritance tax law, and still others resort to both methods. It would seem to be the better and more equitable course to appoint appraisers, for, by that means, all interested parties, including the state, are served with notice, and are given an opportunity to be heard in the important matter of fixing a basis for the tax. —Becker v. Nye, 8 Cal. App. 129, 96 Pac. 333, 334. It may here be observed that, although an appraiser has been appointed, and an order made fixing the amount of a collateral-inheritance tax upon an estate of great value, if it comes to the knowledge of the judge that the figures given in the appraisement represent very much less than the value of the property, he may very properly revoke the order and appoint a special appraiser whom he believes will render a true report. The inheritance tax has become an important factor in the revenue system of the state, and it should be collected as closely as any other impost. The rendering of a report is not a mere neighborly act or personal favor, but a sworn duty, and the tendency to make undervaluations, without any sense of criminality in so doing, can only be checked by vigilance on the part of the judge having jurisdiction of the matter. To make the proper collection of inheritance taxes, undervaluations and other frauds and evasions must be prevented by him. The question as to whether the homestead, family allowance, expenses of administration, and debts of decedent—either or all—should be excluded from the value of the estate, and the balance only made the subject of the tax, is one of construction of the statute, and has never been decided by the supreme court of California. "The decisions in other states, influenced, no doubt, by divergencies in the statutes themselves, are not harmonious, some holding, that only the exemptions enumerated in the statute should be deducted, others holding that debts, but not the other items, should be exempt, and still others that all the above items should be exempt. There is likewise some disagreement as to whether the rents, issues, and profits should be taken into account, and the state given a tax upon accumulations. There is also a question as to what point of time should be taken for the valuation of the estate—whether at the death of decedent, at which time the right of the state is vested, under our law, or at the time of the appraisement."—Becker v. Nye, 8 Cal. App. 129, 96 Pac. 333, 335. In California, the statute giving a county treasurer a commission on collections made by him for the state inheritance tax, was repealed by the county government act.—San Diego County v. Schwartz, 145 Cal. 49, 78 Pac. 231, 232. Where the court has duly considered an inheritance tax report and fixed the tax, a motion by the state to vacate the order, the showing on the motion and the discretion of the trial court in passing on it are the same as in a motion for a new trial on the

ground of newly discovered evidence.—*Estate of Harkness*, 176 Cal. 537, 169 Pac. 78. An inheritance is payable upon personal property in any state where the personal property is located at the time of the death of the decedent, if the statute of such state so provides, and a tax may be collected there, as well as in the state where the deceased died and where the heir resides.—*People v. Palmer's Estate*, 25 Colo. App. 450, 139 Pac. 555. The usual provisions of inheritance tax statutes (that the executor or administrator must collect and pay the tax) is no proof or indication that the estate of the deceased is in any way liable for the tax, but are enacted to insure the payment of it.—*People v. Palmer's Estate*, 25 Colo. App. 450, 139 Pac. 555. The entire property, that passes at all, passes immediately upon the death, and as the heir must pay the tax, and not the estate, the heir receives the entire property and may pay the tax out of his or her personal funds, but, for convenience and certainty of collection, it is provided that it must be paid by the executor or administrator.—*People v. Palmer's Estate*, 25 Colo. App. 450, 139 Pac. 555. Where a testator dies leaving his estate to a devisee who is subject to an inheritance tax and he also dies leaving in turn an estate, the residuary legatees of which are also subject to an inheritance tax, the first inheritance tax is to be deducted from the amount of the second estate upon which such second inheritance is to be computed.—*Williams v. McDougald*, 23 Cal. App. 285, 137 Pac. 1067. The provisions of section 7675 of the Revised Codes of Montana do not relieve an estate from the burden of an inheritance tax, nor impair the power of the court to collect it; the jurisdiction of the court is conferred by section 7740 of those codes.—*State v. District Court*, 41 Mont. 357, 364, 109 Pac. 438. The inheritance tax law contemplates notice and a hearing of the report of the inheritance tax appraiser, a determination by the court after such hearing, and an authorization to the county treasurer to receive the inheritance tax when such formal proceedings have been taken.—*Estate of Haskins*, 170 Cal. 267, 149 Pac. 576. The withholding by an administrator of property from the appraisers, so that it escapes assessment for an inheritance tax prepared from the inventory filed in the proceedings for settling the estate, does not deprive the district court of jurisdiction to order, on motion subsequently made by the state treasurer setting forth the facts, the appraisal of such withheld property and the fixing of the amount of the inheritance tax thereon.—*In re Picot's Estate* (Utah), 178 Pac. 75.

(3) **Final account to show payment of tax.**—The final account must be rendered, settled, and allowed before final distribution, and such account can not be rendered and settled until after the amount of the collateral-inheritance tax is finally determined, so that its payment can be made to appear in the final account.—*Becker v. Nye*, 8 Cal. App. 129, 96 Pac. 333, 334. Before distribution can be had, the collateral-inheritance tax must be paid, and until that is done, the estate is not in a condition to be closed.—*Becker v. Nye*, 8 Cal. App. 129, 96 Pac. 333,

334; *Estate of Lander*, 6 Cal. App. 744, 93 Pac. 202. At the time the final account is settled, the receipt for payment of the collateral-inheritance tax should show that it has been countersigned by the controller. The settlement and approval of the final account, without such action by the controller, would probably be premature.—*Becker v. Nye*, 8 Cal. App. 129, 96 Pac. 333, 334. Where the executor of an estate has in his possession funds of the same, ample to pay the inheritance tax due thereon, an order of the probate court approving his final account and discharging him, was a violation of the inhibition of the statute forbidding the allowance and approval of the executor's account and his discharge until the payment of the tax, and is invalid, and should be set aside on motion of the state.—*In re Estate of Moseley*, *State v. Nagle*, 100 Kan. 495, 499, L. R. A. 1917E, 1160, 164 Pac. 1073, 1074.

(4) **Power and duty of state controller.**—The state controller has no revisory power in the matter of fixing the amount of a collateral-inheritance tax, or in determining whether the court has rightly fixed it.—*Becker v. Nye*, 8 Cal. App. 129, 96 Pac. 333, 335. The state controller of California does not figure in any part of the machinery provided for the collection of such a tax, or its enforcement; and where the court has decided, with reference to such a tax, in any particular case, the controller has no discretion, but should countersign and affix his seal to a receipt of payment, to the county treasurer, of the amount on account of inheritance tax in the matter of the particular estate.—*Becker v. Nye*, 8 Cal. App. 129, 96 Pac. 333, 335. It is the duty of the state controller to countersign receipts for the payment of collateral-inheritance taxes, and he may be compelled to do so by a writ of mandamus.—*Becker v. Nye*, 8 Cal. App. 129, 96 Pac. 333, 335. Section 14 of the California Inheritance Tax Act (Laws of 1913, page 1076) provides that the state controller shall appoint one or more persons in each county of the state to act as inheritance tax appraisers therein, payment for the services of the appointee to be made by the county treasurer out of any funds in his hands on account of said tax, on presentation of a sworn itemized account and on the certificate of the superior court, at the rate of \$5 a day for every day actually and necessarily employed in said inheritance tax appraisal, together with his actual and necessary traveling and other incidental expenses; provided, that when in a probate proceeding one of these has not been chosen to act as one of the three appraisers (under section 1444, Code Civ. Proc.) and has not paid his fees therefor, the expense of fixing the inheritance tax shall be charged to the estate concerned in that proceeding.—*Estate of Haskins*, 170 Cal. 267, 149 Pac. 576. The state controller names one or more inheritance tax appraisers in each county. The court in probate names three disinterested appraisers for each estate in probate. Of these three, one must, and the others may or may not (within the discretion of the court in probate), be selected from the list of authorized inheritance tax appraisers within

the county. In case the court does not select one of these authorized inheritance tax appraisers to act as one of the three appraisers of an estate in course of settlement, the expense of fixing the inheritance tax in that estate shall be taken from the assets of the estate, and not from the fund in the hands of the county treasurer. Hence, it is a matter of economy for an executor or administrator to see that this selection shall be made in the appointment of the appraisers.—*Estate of Haskins*, 170 Cal. 267, 272, 149 Pac. 576.

12. Actions.

(1) *In general.*—In an action by the state to enforce an inheritance tax, a sufficient case is made out if the plaintiff proves by the probate judge the performance of his duties in settling the estate, by the administrator the listing of the decedent's property and by other testimony the tax commission's schedule, classification, findings, and assessments of the tax, and by the beneficiaries the fact that the tax has not been paid by them.—*State (ex rel. McGill) v. Gerhards*, 99 Kan. 462, 162 Pac. 1149. An assessment for an inheritance tax based in part upon vested rights subject to the War Revenue Act, but covering interests also which are not so vested, may be the subject of a suit by the party aggrieved, and such party may in such suit recover the excess.—*Rosenfeld v. Scott (Cal.)*, 232 Fed. 509, 511. The federal refunding act of June 27, 1902, had for its purpose the doing of justice by the government to the citizen in providing a means of restoring to the latter moneys to which the government was not entitled but which he had been required to pay by reason of a misconstruction put upon the provisions of the War Revenue Act by the revenue officers, and as to the recovery of which the statutes then existing afforded no remedy.—*Rosenfeld v. Scott (Cal.)*, 232 Fed. 509, 511.

(2) *Defenses.*—In a suit by the state to enforce an inheritance tax the statute of limitations is no defense.—*State (ex rel. McGill) v. Gerhards*, 99 Kan. 462, 162 Pac. 1149. In a suit by the state against the heirs of a decedent to recover an inheritance tax, the contention is immaterial that the defendants might claim, as earnings in return for services done for the decedent, the amount coming to them in distribution.—*State (ex rel. McGill) v. Gerhards*, 99 Kan. 462, 162 Pac. 1149.

(3) *Pleading and evidence.*—The state, in order to subject to the inheritance tax law of 1911 shares of corporate stock, alleged to have been transferred in an attempted evasion of that law, must allege and prove that no valuable and adequate consideration passed.—*Nickel v. State*, 179 Cal. 126, 175 Pac. 641. Under a law which renders transfers taxable as inheritances, if made in "contemplation of death," and without a "valuable and adequate consideration," a complaint, in an action to quiet title, as against the state, alleging that the claim of the state is "without right," alleges in effect that there was such a valuable and adequate consideration.—*Nickel v. State*, 179 Cal. 126,

175 Pac. 641. In a proceeding under the inheritance tax law of 1902, by the district attorney against the executor of an estate to recover taxes, the executor may demur to the application in the same manner and on the same grounds as in ordinary civil actions.—*Chambers v. Gallagher*, 177 Cal. 704, 705, 171 Pac. 931. The burden of showing that a transfer is subject to a collateral inheritance tax is on the state.—*In re Minor's Estate* (Cal.), 4 A. L. R. 456, 180 Pac. 813.

(4) **Questions of fact.**—The question whether a transfer was made in contemplation of death, in an action to quiet title against the state which claims that the thing transferred is subject to an inheritance tax, is for the jury.—*Nickel v. State*, 179 Cal. 126, 175 Pac. 641. The question whether a gift was or was not made in contemplation of death, and hence subject to tax as an inheritance, is one of fact, to be determined from the nature and character of the instrument of conveyance and from all the circumstances of its execution.—*Nickel v. State*, 179 Cal. 126, 175 Pac. 641.

(5) **Laches and limitations.**—Under the inheritance tax law of 1902, the statute of limitations applied to the liability of an executor of an estate.—*Chambers v. Gallagher*, 177 Cal. 704, 707, 171 Pac. 931. It was the duty of the executor under the inheritance tax act of 1902, to reserve the tax out of money distributed, or, if other property than money was distributed, to collect the tax from the distributee and pay it to the county treasurer within thirty days after distribution, and his failure to do so gave rise to a cause of action therefor in any case at the expiration of thirty days after final distribution of the estate, and the statute began to run at that time.—*Chambers v. Gallagher*, 177 Cal. 704, 707, 171 Pac. 931. The obligation of a beneficiary under a will to participate in the payment of the succession tax is an obligation not founded on an instrument in writing; and an executor, who has paid the tax and would recover from such beneficiary, must proceed within three years.—*Tietjen v. Heberlein*, 54 Mont. 486, 171 Pac. 928. No inaction, procrastination, or delay on the part of public officers will prevent the state from recovering its due, nor bar its right thereto.—*In re Estate of Moseley*, *State v. Nagle*, 100 Kan. 495, 496, 497, L. R. A. 1917E, 1160, 164 Pac. 1073. Section 4 of the inheritance tax act of 1913, is inoperative so far as it purports to raise the bar of the statute of limitations from causes of action which were already barred when it was enacted, inasmuch as it is to that extent an attempt to divest rights already vested.—*Chambers v. Gallagher*, 177 Cal. 704, 707, 171 Pac. 931.

(6) **Conclusiveness of judgment.**—After a court has heard and determined a question relative to a collateral-inheritance tax, its order or judgment is conclusive, subject only to be reviewed on appeal.—*Becker v. Nye*, 8 Cal. App. 129, 96 Pac. 333, 335.

13. **Appeal.**—The state has a right to appeal from an order or decree of the superior court fixing the amount of a collateral-inheritance tax,

as the state is an interested party.—*Becker v. Nye*, 8 Cal. App. 129, 96 Pac. 333, 335. An appeal may be taken from an order directing the payment of a collateral-inheritance tax as a claim against the estate, or from a decree of distribution directing the deduction of the tax; and the state, being an interested party, may, through the district attorney or attorney-general, avail itself of such right of appeal.—*Frost v. Superior Court*, 2 Cal. App. 342, 344, 83 Pac. 815; *Becker v. Nye*, 8 Cal. App. 129, 96 Pac. 333, 335. For the purposes of the inheritance tax, in a case where a husband and wife made repeated deposits in a bank on joint account, the money to be subject to demand of either and payable to the survivor, and where the first deposit so made was prior to the passage of an inheritance tax law, and there is nothing to show whether later deposits were or were not so made, it will be presumed on appeal, in order to sustain a judgment, that the later deposits were so made.—*Estate of Gurnsey*, 177 Cal. 211, 170 Pac. 402.

PART XX.

APPEAL.

CHAPTER I.

APPEALS.

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§ 1061. Appeal may be taken, when.

An appeal may be taken from a superior court in the following cases:

1. From a final judgment entered in an action, or special proceeding, commenced in a superior court, or brought into a superior court from another court;

2. From an order granting a new trial in an action or proceeding tried by a jury where such trial by jury is a matter of right, or granting or dissolving an injunction, or refusing to grant or dissolve an injunction, or appointing a receiver, or dissolving or refusing to dissolve an attachment, or changing or refusing to change the place of trial, from any special order made after final judgment, from any interlocutory judgment, order, or decree, hereafter made or entered in actions to redeem real or personal property from a mortgage thereof, or lien thereon, determining such right to redeem and directing an accounting; and from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties and directs partition to be made, and interlocutory decrees of divorce.

3. From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof; or against or in favor of setting apart property, or making an allowance

for a widow or child; or against or in favor of directing the partition, sale or conveyance of real property, or settling an account of an executor, administrator or guardian, or refusing, allowing or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, or legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser or appraisers setting apart a homestead; from an order, judgment, or decree fixing inheritance tax or determining that no inheritance tax is due.—*Kerr's Cyc. Code Civ. Proc.*, § 963.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 1772.

Arizona—Revised Statutes of 1913, paragraph 1232.

Colorado—Mills's Statutes of 1912, section 8043.

Idaho—Compiled Statutes of 1919, section 7173.

Kansas—General Statutes of 1915, sections 4676, 5068.

Nevada—Revised Laws of 1912, section 6112.

Oklahoma—Revised Laws of 1910, section 6501.

South Dakota—Compiled Laws of 1913, section 5962.

Washington—Remington's 1915 Code, sections 1617, 1716; Laws of 1917, chapter 156, page 706, section 221.

Wyoming—Compiled Statutes of 1910, sections 5042, 5467.

§ 1062. Appeal by executor, administrator, or guardian.

When an executor, administrator, or guardian, who has given an official bond, appeals from a judgment or order of the superior court made in the proceedings had upon the estate of which he is executor, administrator, or guardian, his official bond shall stand in the place of an undertaking on appeal; and the sureties thereon shall be liable as on such undertaking.—*Kerr's Cyc. Code Civ. Proc.*, § 965.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona—Revised Statutes of 1913, paragraph 1250.

Colorado—Mills's Statutes of 1912, section 8043.

Idaho*—Compiled Statutes of 1919, section 7174.

Kansas—General Statutes of 1915, section 4678.

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Nevada—Revised Laws of 1912, section 6114.

North Dakota—Compiled Laws of 1913, section 8603.

Oklahoma—Revised Laws of 1910, section 6520.

South Dakota—Compiled Laws of 1913, section 5981.

§ 1063. Appeal in probate proceedings. Preference.

Appeals in probate proceedings and contested election cases shall be given preference in hearing in the supreme court, and be placed on the calendar in the order of their date of issue, next after cases in which the people of the state are parties.—*Kerr's Cyc. Code Civ. Proc.*, § 57.

§ 1064. Reversal of order of appointment. Effect of.

When the judgment or order appointing an executor, or administrator, or guardian, is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed.—*Kerr's Cyc. Code Civ. Proc.*, § 966.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho*—Compiled Statutes of 1919, section 7175.

Nevada—Revised Laws of 1912, section 6115.

North Dakota—Compiled Laws of 1913, section 8622.

Oklahoma*—Revised Laws of 1910, section 6521.

South Dakota*—Compiled Laws of 1913, section 5982.

Utah*—Compiled Laws of 1907, section 4043.

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1. Right of appeal.

(1) In general.—The right of appeal, in probate matters, given by the constitution, should be liberally construed.—Estate of Scott, 124 Cal. 671, 675, 57 Pac. 654. An appeal, in probate cases, takes precedence over all other cases, except those to which the people of the state are parties. The purpose of giving this preference or priority is to favor the speedy settlement of the estates of deceased persons.—Estate of Heywood, 154 Cal. 123, 97 Pac. 825, 827. With respect to the right of appeal, it is immaterial whether a proceeding in probate is, for certain purposes, a civil case or a special proceeding, or whether, in certain aspects, an order in probate is a final judgment.—Estate of Winslow, 128 Cal. 311, 312, 60 Pac. 931. The remedy for one aggrieved by an order or judgment of the probate court is in said court, by a proper motion or by appeal.—Clark v. Rossier, 10 Ida. 348, 3 Ann. Cas. 231, 78 Pac. 358. The right to have an appealable order reviewed for error is lost by failure to appeal therefrom.—Gruwell v. Seybolt, 82 Cal. 7, 10, 22 Pac. 938. If an appealable order is not appealed from, and no motion is made to set it aside, it becomes final, and is conclusive as to the matters comprised therein.—Estate of Nolan, 145 Cal. 559, 561, 79 Pac. 428. Although an order settling an account, as

well as a decree of distribution, were both made at the same time, and are included in the same paper under one signature of the judge, this fact does not affect the right of an appeal from either order, as each of the orders is appealable.—*Estate of Delaney*, 110 Cal. 563, 567, 42 Pac. 981. The right to appeal from an order, directing a conveyance of real estate in probate proceedings, does not authorize an appeal from an order directing the execution of a lease of realty, because the word "conveyance" does not include a lease.—*In re Tuohy's Estate*, 23 Mont. 305, 58 Pac. 722, 723. A plaintiff in claim and delivery, in an action in the district court, who has been defeated in his action as to alleged property of his, scheduled as assets of the estate of his deceased wife, has a right to an appeal notwithstanding the fact of his having filed in the county court a claim to exemption of such property as husband of the deceased.—*Truman v. Dakota Trust Co.*, 29 N. D. 456, 462, 151 N. W. 219. Where the court, after a partial hearing, holds that an executor must be held to account for profits derived through his dealings with the trust funds, but no final order is made, he may not apply to the supreme court for a writ of supervisory control; such application is premature, and, in any event, he has an effective remedy by appeal.—*State v. District Court*, 35 Mont. 364, 366, 90 Pac. 161. (Citing Code Civ. Proc., § 2540.)

(2) *How limited.*—Appeals in probate matters can only be taken from such judgments and orders as are mentioned in the statute authorizing an appeal.—*Estate of Edelman*, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 962, 963; *Estate of Cahill*, 142 Cal. 628, 76 Pac. 383; *Estate of Winslow*, 128 Cal. 311, 60 Pac. 931; *Estate of Hickey*, 121 Cal. 378, 53 Pac. 818; *Estate of Wittmeier*, 118 Cal. 255, 50 Pac. 393; *Estate of Walkerly*, 94 Cal. 352, 29 Pac. 719; *Estate of Moore*, 86 Cal. 58, 24 Pac. 816; *In re Tuohy's Estate*, 23 Mont. 305, 58 Pac. 722; *Estate of Bouyssou*, 1 Cal. App. 657, 82 Pac. 1066; *Estate of Ohm*, 82 Cal. 160, 163, 22 Pac. 927. Orders refusing to vacate a decree of distribution and settlement of final account, and refusing to vacate an order settling an administrator's account and discharging him, are not among the judgments or orders enumerated in the Montana statute as appealable, and the court therefore has no jurisdiction to entertain an appeal from such orders in that state.—*In re Kelly's Estate*, 31 Mont. 356, 78 Pac. 579. The right of appeal in probate matters from the probate to the district court in Idaho is of purely statutory regulation, and where the right is challenged, the authority for such appeal must be found in the statutes.—*In re Coryell's Estate*, 16 Ida. 201, 101 Pac. 723. Appeals lie in probate cases only as given by statute, and no statute authorizes an appeal from a finding.—*Estate of Funkenstein*, 170 Cal. 594, 150 Pac. 987.

(3) *Non-application of code provisions.*—The provisions of subdivision 2 of section 963 of the Code of Civil Procedure of California, relative to appeals from orders made after final judgment, are not applicable to probate proceedings.—*Estate of Wittmeier*, 118 Cal. 255, 50 Pac. 393;

Estate of Cahill, 142 Cal. 628, 76 Pac. 333. See Estate of Bauquier, 88 Cal. 302, 26 Pac. 532.

2. New trial and appeal.

(1) In general.—It would be impracticable to enumerate the cases in which a motion for a new trial is appropriate in probate proceedings, but it may be said, generally, that whenever the action of the court which is invoked is dependent upon the existence of certain extrinsic facts, which are presented to it for determination in the form of pleadings, and are to be decided by it in conformity with the preponderance of the evidence offered thereon, an issue of fact arises, which, after its decision, may be re-examined by the court upon a motion for a new trial.—Estate of Bauquier, 88 Cal. 302, 315, 26 Pac. 532. A motion for a new trial is not authorized in a case where ex parte applications for letters of administration are had together, and no issues of fact are made by the pleadings. And if such a motion is made, but is not entertained and is denied by the court, no appeal will lie from such an order.—Estate of Heldt, 98 Cal. 553, 554, 33 Pac. 549. The power to order a new trial does not exist in cases of appeal from the decrees of the county court in probate matters.—In re Roach's Estate, 50 Or. 118, 92 Pac. 118, 123. A judgment defendant who complains of no error as to a finding of fact, but only that the court erred in a matter of law, need not move for a new trial in order to be entitled to an appeal.—McLeod v. Palmer, 96 Kan. 159, 150 Pac. 535.

REFERENCES.

New trials and appeals.—See § 825, ante.

(2) Application of code provisions.—It is only those provisions of the code relative to new trials and appeals, which are consistent with the provisions of the probate act, that apply to probate proceedings. It was evidently the intention of those who framed and adopted the provisions of the court relative to probate proceedings to curtail dilatory proceedings in the settlement of an estate.—Leach v. Pierce, 93 Cal. 614, 618, 29 Pac. 235; Estate of Franklin, 133 Cal. 584, 585, 65 Pac. 1081; and see § 825, ante. The mode and manner of settling the accounts of an executor or administrator is specially provided for in the probate act, and, if followed, is inconsistent with the provisions relating to new trial. Hence a motion for a new trial is a proceeding not applicable to the case of an order settling the annual account of an executor.—Estate of Franklin, 133 Cal. 584, 585, 65 Pac. 1081. A motion for a new trial will not be entertained, in proceedings under sections 1465 and 1466 of the Code of Civil Procedure of California, to set apart a homestead, or exempt personal property, or for a family allowance.—Estate of Heywood, 154 Cal. 312, 97 Pac. 825, 826. Under subdivision 2, section 1722 of the Montana Code of Civil Procedure, an appeal lies from a decree ordering the distribution of an estate, and from an order denying a new trial. That provision

applies to matters in probate proceedings as well as to ordinary civil cases.—*In re Davis' Estate*, 27 Mont. 235, 70 Pac. 721, 724.

(3) *Appeal from order denying new trial.*—In cases where a motion for a new trial may be made, an appeal lies from an order denying it, although the record on appeal contains no statement or bill of exceptions, properly settled, upon which it is predicated.—*In re Davis' Estate*, 27 Mont. 235, 70 Pac. 721, 724. In Montana, an appeal may be taken from an order denying a motion for a new trial in proceedings for the distribution of an estate.—*In re Davis' Estate*, 27 Mont. 235, 70 Pac. 721, 724. An appeal from an order denying a new trial will not be dismissed upon the ground of any defect in the proceedings in the superior court leading up to the order, or because the court below improperly made the order.—*Estate of Scott*, 124 Cal. 671, 673, 57 Pac. 654. An order denying a new trial, if made upon a motion to reject or to vacate a non-appealable order, is not appealable.—*Estate of Keane*, 56 Cal. 407, 409. An executor and legatee may move for a new trial of issues as to persons entitled to share in the estate of a testator, and appeal from the order denying the motion, and from so much of an order as adjudges that such persons are so entitled to share.—*In re Klein's Estate*, 35 Mont. 185, 88 Pac. 798, 801. The fact of an appeal from a judgment having been dismissed on respondent's motion is no reason why an appeal from an order denying a motion for a new trial should not be entertained.—*Murphy v. Nett*, 47 Mont. 38, 130 Pac. 452. Where two *ex parte* applications for letters of administration are heard together and no issue is joined as to the competency of either of the parties to act, a motion for a new trial does not lie and there is no appeal from an order denying such a motion.—*In re Antonioli's Estate*, 42 Mont. 219, 111 Pac. 1035.

3. Who may appeal.

(1) *In general.*—The statute "gives the right of appeal to any party 'aggrieved' by the action of the court, whether he be 'interested' in (italicized in the opinion) the estate or not."—*Estate of Pearsons*, 98 Cal. 603, 605, 33 Pac. 451. While as a general rule only parties to the record may prosecute an appeal, this is on the ground that in ordinary proceedings in personam it is only parties and their privies who are bound by the judgment, but probate proceedings being in rem, all interested parties are bound by the judgment or decree whether parties to it or not.—*Barette v. Whitney*, 36 Utah 574, 37 L. R. A. (N. S.) 368, 106 Pac. 528. Where one's rights or interests are injuriously affected by a judgment or appealable order, in litigation to which he is not formally a party, or in which, if a party, he has not received due notice, so that as to him the judgment or order is made *ex parte*, such a one is entitled to an appeal from a refusal to vacate such judgment or order.—*Estate of Baker*, 170 Cal. 578, 150 Pac. 989. Where a plaintiff in a partition suit is given judgment against non-answering defendants only, a defendant who has answered

may appeal, if his interests may possibly be affected by the standing of the judgment as taken.—*McLeod v. Palmer*, 96 Kan. 159, 150 Pac. 535. The test as to whether any one is a necessary party to an appeal from a decree in a probate proceeding is whether his interests will be affected by a reversal or a modification of the judgment, decree, or order appealed from.—*In re Myhren's Estate*, *Myhren v. Myhren*, 95 Wash. 101, 163 Pac. 388. A person claiming to be entitled to the distribution of the estate of a deceased person as devisee, legatee, or heir at law, is entitled to appeal from the decree of distribution and to have a bill of exceptions thereon, embodying the pertinent evidences offered at the hearing, notwithstanding he may not have appeared in person in advocacy of or opposition to the matter pending for determination.—*Estate of Benner*, 155 Cal. 153, 99 Pac. 715.

REFERENCES.

Parties entitled to appeal in respect of different matters arising in course of administration.—See note in *Ann. Cas.* 1913C, 850

2. *Executors or administrators.*—Where an order is made, in a proceeding against the estate of a deceased person, to which the administrator is a party, that is prejudicial to the interest which it is his duty to protect, he may appeal therefrom in his representative capacity.—*Denison v. Jerome*, 43 Colo. 456, 96 Pac. 166, 168. An administrator, as such, has the right of an appeal from an order settling his account, and the right to do so can not be affected by any order revoking his letters.—*Estate of McPhee*, 154 Cal. 385, 97 Pac. 878, 881. An administrator with the will annexed, and an heir of a beneficiary to the decedent's will, have a right to appeal from a decree granting a distribution of the estate. They are parties "aggrieved."—*In re Davis' Estate*, 27 Mont. 235, 70 Pac. 721, 724. An executor may appeal from an order of partial distribution.—*Estate of Mitchell*, 121 Cal. 391, 393, 53 Pac. 810. An administrator, being a party "aggrieved" by a premature order directing the payment of a preferred claim, has a right to appeal therefrom.—*Estate of Smith*, 117 Cal. 505, 508, 49 Pac. 456. In general, an executor has no right of appeal from a decree fixing conflicting rights of heirs and devisees, and distributing the estate accordingly.—*Estate of Welch*, 106 Cal. 427, 429, 39 Pac. 806. An appeal is properly prosecuted by the administrator of plaintiff who dies pending the appeal.—*Wright v. Northern Pac. Ry. Co.*, 45 Wash. 432, 88 Pac. 832, 833. An executor, under the terms of a will, who petitions for the probate of the instrument, is a "party aggrieved" in case of a decision refusing its admission to probate, and therefore may appeal.—*Estate of Collins*, 174 Cal. 663, 164 Pac. 1110. The right which an administrator may have to compensation on revocation of his letters on a will being admitted to probate is not such an interest as will entitle him to appeal from the order admitting the will.—*Cairns v. Donahay*, 59 Wash. 130, 109 Pac. 335. An executor in his official capacity has not sufficient interest to entitle him to appeal from an order of partial distribution of the estate.—*In re Macky's Estate*, 46

Colo. 79, 102 Pac. 1089. An executor has no standing to question, by means of an appeal, the division of the estate among the heirs or beneficiaries.—Estate of Ayers, 175 Cal. 187, 165 Pac. 528. On the admission of a will to probate and the due appointment of the executor and his assuming the administration, this officer represents all the beneficiaries, and it becomes his duty to protect their interests; he has the right to oppose a contest until a final decision is had and may appeal from an adverse judgment.—Estate of Collins, 174 Cal. 663, 164 Pac. 1110. If a court goes beyond its powers in holding an executor to account for profits, or in removing him from office, he has the right of appeal.—State v. District Court, 35 Mont. 364, 367, 90 Pac. 161. (Citing Code Civ. Proc., § 2544.)

REFERENCES.

Right of executor or administrator to appeal as party "aggrieved."—See note 13 L. R. A. 745.

4. Time for taking.—The time for appealing from probate orders, judgments, and decrees is limited, by section 1715 of the Code of Civil Procedure of California, to sixty days from the date of entry, and the appellate court has no jurisdiction of an appeal attempted after the lapse of that time.—Estate of Fay, 145 Cal. 82, 104 Am. St. Rep. 17, 78 Pac. 340; Estate of Campbell, 141 Cal. 72, 74 Pac. 550; Estate of Hughston, 133 Cal. 321, 65 Pac. 742, 1039; Estate of Heldt, 98 Cal. 553, 33 Pac. 549; Estate of Backus, 95 Cal. 671, 30 Pac. 796; Estate of Fisher, 75 Cal. 523, 17 Pac. 640; Estate of Burton, 64 Cal. 428, 1 Pac. 702; Estate of Harland, 64 Cal. 379, 1 Pac. 159. The time for taking an appeal from a probate order begins to run from the entry of such order in the minute-book of the court.—Tracy v. Coffey, 153 Cal. 356, 95 Pac. 150, 151; Estate of Pearsons, 119 Cal. 27, 50 Pac. 929; Estate of Scott, 124 Cal. 671, 676, 57 Pac. 654; Estate of Sheld, 122 Cal. 528, 55 Pac. 328. Under section 1715, Code of Civil Procedure of California, appeals in probate proceedings had to be taken within sixty days after the order, decree, or judgment was entered. If not so taken the appeal would be dismissed.—Estate of Brewer, 156 Cal. 89, 103 Pac. 486. That section, however, was amended in 1911, so that "the appeal may be taken at any time after the order, decree, or judgment is made or rendered, but not later than sixty days after the same is entered in the minute-book of the court."—Estate of Stone, 173 Cal. 675, 161 Pac. 258. The act of 1915, amending section 939 of the Code of Civil Procedure of California, whereby pending proceedings on motion for a new trial the time for appeal from the judgment is made to expire 30 days after entry in the trial court of the order disposing of the motion, applies to an appeal from an order admitting a will to probate.—Estate of Seiler, 174 Cal. 498, 164 Pac. 401. Though a proceeding in a probate matter is by petition, yet, if the decree rendered is a final disposition of the matter in controversy, a cross-appeal is not tardily taken, where the notice was given more

than 15 days, but less than 90 days, after the entry of the decree; in such a case, the time for an appeal is 90 days.—*In re Crim's Estate*, 89 Wash. 395, 154 Pac. 811.

REFERENCES.

Appeal must be taken within what time.—See § 826, *ante*.

5. Appealable orders.

(1) **Appealable orders. In general.**—The following orders are appealable: That part of an order vacating the appointment of an administrator.—*Estate of Bouyssou*, 1 Cal. App. 657, 82 Pac. 1066, 1067; an order denying a new trial to one who has made application for the issuance of letters testamentary to one named as executrix in the will, where there has been a judgment of incompetency against her, and a denial of her application.—*Estate of Bauquier*, 88 Cal. 302, 313, 26 Pac. 178, 532; and an order setting apart a homestead.—*Gruwell v. Seyboldt*, 82 Cal. 7, 10, 22 Pac. 938; *Estate of Burns*, 54 Cal. 223, 228. An appealable order of the probate court is to be treated as final, and is conclusive of the matter determined.—*Estate of Stott*, 52 Cal. 403, 406. A writ of prohibition will not lie to prohibit the enforcement of an appealable order.—*Murphy v. Superior Court*, 84 Cal. 592, 24 Pac. 310, 311. A motion to dismiss an appealable order will be denied.—*Estate of Bouyssou*, 1 Cal. App. 657, 82 Pac. 1066. Under the provisions of section 16 of article 7, and of section 2 of the schedule of the constitution of Oklahoma, an appeal lies to the district court from the county court in probate matters in those cases in which an appeal was allowed under the statutes of Oklahoma Territory.—*Barnett v. Blackstone Coal & Milling Co.*, 35 Okla. 724, 131 Pac. 541. A final judgment or order made by the county court in the administration of the estate of a deceased Osage Indian is appealable the same as final orders or judgments made in the estates of other citizens.—*Wah-Tsa-E-O-She v. Webster* (Okla.), 172 Pac. 78.

(2) **Appealable orders. Payment of claims.**—The following orders are appealable: An order directing the payment of a debt or claim, irrespective of its amount.—*Ex parte Orford*, 102 Cal. 656, 657, 36 Pac. 928; an order dismissing a petition to have an administrator show cause why a claim that has been allowed shall not be paid.—*Estate of McKinley*, 49 Cal. 152, 153; and an order directing the payment of a preferred claim, notwithstanding a previous adjudication that it was a preferred claim, from which no appeal has been taken.—*Estate of Smith*, 117 Cal. 505, 507, 49 Pac. 456.

(3) **Appealable orders. Attorneys' fees.**—The following orders are appealable: An order allowing an attorney's fee to the attorney of the executor.—*Estate of Kruger*, 123 Cal. 391, 392, 55 Pac. 1056; an order directing the payment of a claim for attorneys' services, which claim has been allowed and ordered to be paid by the probate court.—*Stuttmeister v. Superior Court*, 72 Cal. 487, 489, 14 Pac. 35; and an

order making an allowance to an administrator for the services of himself and his attorney, where such order has been entered in the form of a judgment of the court, and the sum is found to be reasonable.—*In re Sullivan's Estate*, 36 Wash. 217, 78 Pac. 945, 947.

(4) **Appealable orders. Family allowance.**—The following orders are appealable: An order granting a family allowance to the widow.—*Estate of Stevens*, 83 Cal. 322, 326, 17 Am. St. Rep. 252, 23 Pac. 379; *Estate of Nolan*, 145 Cal. 559, 561, 79 Pac. 428; *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38, 41; and an order refusing a family allowance to an alleged widow, or to set aside a homestead to her.—*Estate of Harrington*, 147 Cal. 124, 81 Pac. 546, 548. After an appeal has been perfected from an order requiring the administrator to pay a family allowance, the court has no power to make a further order directing the administrator to make such payment.—*Pennie v. Superior Court*, 89 Cal. 31, 26 Pac. 617.

(5) **Appealable orders. Settlement of accounts.**—The following orders are appealable: An order settling the account of an administrator or executor, irrespective of the amount involved.—*Estate of Rose*, 80 Cal. 166, 170, 22 Pac. 86; *Estate of Grant*, 131 Cal. 426, 63 Pac. 731; *Estate of Delaney*, 110 Cal. 563, 567, 42 Pac. 981; an order settling an account, as well as a decree of distribution.—*Estate of Delaney*, 110 Cal. 563, 567, 42 Pac. 981; an order settling the account of an executor or administrator, but not discharging him from his trust.—*Estate of Rose*, 80 Cal. 166, 170, 22 Pac. 86; *Estate of Coutts*, 87 Cal. 480, 25 Pac. 685; *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38; *Broadwater v. Richards*, 4 Mont. 52, 80, 2 Pac. 544; and a decree disallowing the final account of an executor or administrator.—*Rostel v. Morat*, 19 Or. 181, 23 Pac. 900, 901. If, on application for a decree approving a final account and ordering distribution, the county court denies the same on the ground that the inheritance tax, imposed on estates by statute, has not been paid, the order denying the application is appealable.—*Strauss v. Costello*, 29 N. D. 215, 221, 150 N. W. 874.

(6) **Appealable orders. Distribution.**—The following orders are appealable: A decree of final distribution.—*Daly v. Pennie*, 86 Cal. 552, 553, 21 Am. St. Rep. 61, 25 Pac. 67; a decree of distribution, by the district court, in a probate proceeding pending before it.—*In re McFarland's Estate*, 10 Mont. 445, 26 Pac. 185, 189; and an order of partial distribution of an estate of a deceased person, upon the petition of the legatee.—*Estate of Mitchell*, 121 Cal. 391, 393, 53 Pac. 810.

(7) **Appealable orders. Sale. Mortgage. Conveyance.**—The following orders are appealable: An order of the probate court directing the sale of real estate.—*Stuttmeister v. Superior Court*, 71 Cal. 322, 323, 12 Pac. 270; an order of the probate court, confirming an executor's sale, and directing a conveyance to be made to the purchaser.—*Estate of Pearsons*, 98 Cal. 603, 605, 33 Pac. 451; an order

confirming the sale of the real property of a decedent, made under a power of sale contained in the will, and directing a conveyance to the purchaser.—Estate of Pearsons, 98 Cal. 603, 605, 23 Pac. 451; an order directing the sale of real property which had been sold by the administrator, and the sale confirmed.—Estate of Boland, 55 Cal. 310, 311; an order refusing the confirmation of a sale of real estate and refusing to hear evidence upon the return, as this is virtually "an order against directing the sale or conveyance of real estate."—Estate of Leonis, 138 Cal. 194, 197, 71 Pac. 171; an order authorizing an executor to mortgage lands of the estate, as this is an order directing a conveyance of real property.—Estate of McConnell, 74 Cal. 217, 218, 15 Pac. 746; and an order directing or refusing to direct a conveyance of real estate by an executor or administrator.—Estate of Corwin, 61 Cal. 160, 163. An order setting aside a prior order confirming the sale of land belonging to the estate of a deceased person is in legal effect an order against directing the sale or conveyance of real property within the meaning of subdivision 3 of section 963 of the California Code of Civil Procedure, and is appealable.—Estate of West, 162 Cal. 352, 122 Pac. 953. An order of the district court which confirms an order of the county court in an ancillary administration refusing to grant a petition filed by the principal administrator under the direction of the principal court for the sale of real estate in North Dakota and the transmission of the proceeds thereof to such principal court for the payment of the debts there, is a final order, affecting a substantial right made in a special proceeding and is appealable as such under section 7225, Rev. Codes of 1905 (N. D.).—Dow v. Lillie, 26 N. D. 512, L. R. A. 1915D, 754, 144 N. W. 1082, 1084. An appeal may be taken from the probate to the district court upon the judgment of the former upon objections made to the confirmation of a sale.—In re Christensen's Estate, 15 Ida. 692, 99 Pac. 829. Upon a hearing in the district court of an appeal from a judgment of the probate court on objections to the confirmation of a sale, the case must be retried upon the same issues as were presented to the probate court, and witnesses may be called and testify the same as in the trial of any other cause.—In re Christensen's Estate, 15 Ida. 692, 99 Pac. 829. An order of court, in probate, directing the executors to sell lands of the decedent, situated in another state, and to bring the proceeds into court, or, on failure to do so, to show cause why they shall not be removed, is an order for the sale of real property and appealable as such, notwithstanding the portion thereof requiring the executor to show cause. § 963, subd. 3, Code Civ. Proc.—Estate of Loyd, 175 Cal. 699, 167 Pac. 157.

(8) **Appealable orders. Guardians.**—The following orders are appealable: An order directing a person, as guardian, who has received property for the benefit of minors by a deed of trust, to pay for their support.—Murphy v. Superior Court, 84 Cal. 592, 24 Pac. 310, 311; an erroneous order requiring a guardian to pay for the main-

tenance of his ward.—*Murphy v. Superior Court*, 84 Cal. 592, 598, 24 Pac. 310; and an order of the probate court appointing a guardian of a minor.—*Guardianship of Get Young*, 90 Cal. 77, 78, 27 Pac. 158.

(9) **Appealable orders. Contests over probate of wills.**—Prior to 1901, section 963, subdivision 3, of the Code of Civil Procedure of California, did not authorize an appeal from an order or judgment refusing to revoke the probate of a will.—*Estate of Winslow*, 128 Cal. 311, 60 Pac. 931; but that statute has been enlarged, by amendment, so as to include, "or refusing to revoke the probate of a will." This removes any question as to the right of appeal from a judgment or order refusing to revoke the probate of a will, and the older authorities have no bearing on the question.—*Hartmann v. Smith*, 140 Cal. 461, 467, 74 Pac. 7. An order refusing to revoke the probate of the will of a deceased person is appealable.—*Hartmann v. Smith*, 140 Cal. 461, 467, 74 Pac. 7; *Estate of Hughston*, 133 Cal. 321, 322, 65 Pac. 742, 1039; so is an order revoking the probate of an alleged will and of letters testamentary.—*Estate of Crozier*, 65 Cal. 332, 4 Pac. 109, 110; and an order refusing the probate of a holographic will.—*Estate of Fay*, 145 Cal. 82, 87, 104 Am. St. Rep. 17, 78 Pac. 340. Where there is an appeal from a judgment or order in a contest over the probate of a will, an appeal lies from an order denying a motion for a new trial therein.—*Hartmann v. Smith*, 140 Cal. 461, 467, 74 Pac. 7; *Estate of Spencer*, 96 Cal. 448, 449, 31 Pac. 453. See *Estate of Smith*, 98 Cal. 636, 33 Pac. 744; *Estate of Doyle*, 73 Cal. 564, 15 Pac. 125, 68 Cal. 132, 8 Pac. 691. On an appeal to the district court, from a judgment of the probate court, refusing to admit a will to probate, the district court may, in its discretion, make an order for a trial by jury of any or all of the material facts arising upon the issues between the parties.—*Cartwright v. Holcomb*, 21 Okla. 548, 97 Pac. 385. Upon a trial, *de novo*, in the district court, of a cause appealed from the judgment of a probate court, refusing to admit a will to probate on the ground that the will was forged, it is not error for the district court to require the appellant to make a *prima facie* showing entitling the will to probate, if it appears from the record that the burden of proof was cast upon the appellees to show that the will was forged.—*Cartwright v. Holcomb*, 21 Okla. 548, 97 Pac. 385. An order or judgment of a county court in dismissing a petition for the revocation of the probate of a will is an appealable order under subdivision 8 of section 5451, Comp. Laws of 1909 of the state of Oklahoma.—*Mackey v. Atoka*, 34 Okla. 512, 126 Pac. 767.

(10) **Appealable orders. Appointment of administrator.**—The decision of a probate court refusing to appoint an administrator as it effectually terminated the litigation of the question in that court was a final order or decision from which an appeal lies.—*Miller's Estate v. Executrix of Miller's Estate*, 90 Kan. 819, Ann. Cas. 1915B, 699, L. R. A. 1915D, 856, 136 Pac. 256.

(11) **Appealable orders. Refusal to revoke letters.**—Under section 3041 of Cutting's Comp. Laws of Nevada, an appeal will lie from an order refusing to revoke letters of administration.—*In re Bailey's Estate*, 31 Nev. 377, Ann. Cas. 1912A, 743, 103 Pac. 233.

(12) **Appealable orders. Additional inventory.**—The decision of a probate court denying the application of an interested party for an order requiring the administrator to make an additional inventory of property, claimed to belong to the estate, but omitted from the inventory on file, is a final "decision" of a matter arising under the jurisdiction of that court, and an appeal may be taken therefrom.—*Dobson v. Holmes*, 83 Kan. 476, 112 Pac. 121.

6. Non-appealable orders.

(1) **Non-appealable orders. In general.**—The following orders are non-appealable: An order appointing a special administrator.—*Estate of Carpenter*, 73 Cal. 202, 203, 14 Pac. 677; an order vacating an order substituting a trustee.—*Estate of Moore*, 86 Cal. 58, 59, 24 Pac. 816; an order of the probate court discharging an attachment.—*Ferdinand Westheimer & Sons v. Hahn*, 15 Okla. 49, 78 Pac. 378; an order refusing to quash an execution.—*Blum v. Brownstone*, 50 Cal. 293; an order rejecting a claim against an estate.—*Wilkins v. Wilkins*, 1 Wash. 87, 23 Pac. 411, 412; an order to compel the clerk of the court to pay over certain moneys out of the estate of a deceased person.—*Estate of Poten*, 72 Cal. 576, 14 Pac. 209; an order setting aside an order appointing a guardian ad litem for an incompetent person.—*Estate of Hathaway*, 111 Cal. 270, 271, 43 Pac. 754; an order dismissing a petition to be allowed an attorney's fee for services rendered to an estate, where the matter is pending before the court, and there has been no final determination of the attorney's claim.—*Nash v. Wakefield*, 30 Wash. 556, 71 Pac. 35, 37; an order setting aside an order made, ex parte and without notice, in a case where notice should have been given because of allegations of fraud.—*In re Sinclair's Estate*, 44 Wash. 119, 86 Pac. 1117; and an order denying a motion to vacate an order denying the petition of an executor for an allowance of compensation for extraordinary services, and to restore the case to the calendar.—*Estate of Walkerly*, 94 Cal. 352, 353, 29 Pac. 719. No appeal can be taken from an order dismissing a petition to compel an executor to return money from the estate paid by the petitioner to said executor as an advanced bid, where the order of confirmation of the sale to the petitioner was reversed, and the land was legally sold to another, as the petitioner has no debt or claim against the estate. His remedy is an individual action against the executor.—*Estate of Williams*, 3 Cal. Unrep. 788, 32 Pac. 241, 243. The fact, if it be true, that the court exceeded its jurisdiction in making the original order can not have the effect to make a non-appealable order appealable.—*Estate of Seymour*, 15 Cal. App. 287, 114 Pac. 1023. The remedy of the parties dissatisfied with the jurisdiction of the court to make

the original order would lie on a direct attack upon the court's action on that ground.—Estate of Seymour, 15 Cal. App. 287, 114 Pac. 1023.

(2) **Non-appealable orders. Directions. Command. Contempt.**—The following orders are non-appealable: An order directing an administrator to turn over to his successor, upon resignation or removal, property belonging to the estate, or which has come into his hands as such representative.—In re Barker's Estate, 26 Mont. 279, 67 Pac. 941, 943; an order commanding the dismissal of an action against the executor of an estate of the decedent and another, and directing the discharge of an administrator, upon and after the settlement of an account not yet filed.—Estate of Bullock, 75 Cal. 419, 421, 17 Pac. 540; and an order ordering an administrator to allow his name to be used by a creditor of the estate, in a suit to set aside a conveyance of the decedent, as having been made to defraud his creditors.—Estate of Ohm, 82 Cal. 160, 161, 22 Pac. 927. An appeal will not lie to the supreme court, from a judgment finding an executrix guilty of contempt in failing and refusing to pay over money to the assignee of a distributee as ordered by the court.—Estate of Wiltmeier, 118 Cal. 255, 50 Pac. 393, 394. Where an order of the superior court fixed a place for the interment of the body of the decedent which had been deposited in a vault, and providing for a monument over the grave, an order refusing to vacate that order is not appealable, and an appeal therefrom must be dismissed.—Estate of Seymour, 15 Cal. App. 287, 114 Pac. 1023. Even the original order directing the place of interment and providing for the expense of a monument is not appealable under the statute, any more than from an order refusing to vacate it.—Estate of Seymour, 15 Cal. App. 287, 114 Pac. 1023.

(3) **Non-appealable orders. Revocation of letters.**—An order denying a petition for the revocation of letters of administration is non-appealable.—Estate of Montgomery, 55 Cal. 210; Estate of Keane, 56 Cal. 407; Estate of Moore, 68 Cal. 394, 395, 9 Pac. 315. The Kansas statute makes no provision for an appeal to the district court from an order of the probate court refusing, upon application, to revoke letters testamentary or of administration.—Graves v. Bond, 70 Kan. 464, 78 Pac. 851.

(4) **Non-appealable orders. Accounts.**—The following orders are non-appealable: An order setting aside an order allowing the annual account of an executor.—Estate of Dunne, 53 Cal. 631, 632; an order refusing to set aside an order of distribution and settling an executor's final account.—Lutz v. Christy, 67 Cal. 457, 8 Pac. 39; but see Kerr's Cyc. Code Civ. Proc., § 963, subd. 3; an order setting aside a decree settling the final account of an executor.—Estate of Cahalan, 70 Cal. 604, 12 Pac. 427; an order setting aside a decree settling an executor's final account and vacating a decree of distribution.—Estate of Dean, 62 Cal. 613; and an order vacating a prior order settling the

final account of a representative of the decedent.—*Estate of Hickey*, 121 Cal. 378, 53 Pac. 818. The statute of the state of Idaho authorizes an appeal to the district court from an order settling and allowing an account of an administrator, but where the probate judge settles and allows part of the account of an administrator and continues the remainder for future consideration and hearing, the judgment thus rendered does not settle such account as to the matters continued for future consideration; and an appeal will not lie from such order by those affected by or interested in the matters continued for future consideration.—*In re Coryell's Estate*, 16 Ida. 201, 101 Pac. 724. An order refusing to set aside and to vacate an order settling an administrator's account, is not appealable; it is not specified in the statute as one of the orders and judgments from which an appeal may be taken in probate proceedings.—*In re Spafford's Estate*, *Spafford v. Citizens' T. & S. Bank*, 175 Cal. 52, 165 Pac. 1.

(5) **Non-appealable orders. Distribution.**—The following orders are non-appealable: An order vacating a decree of distribution.—*Estate of Cahalan*, 60 Cal. 232, 233; an order vacating a decree of final distribution.—*Estate of Murphy*, 128 Cal. 339, 340, 66 Pac. 930, referring to former cases; an order refusing to vacate a decree of distribution.—*Estate of Wiard*, 83 Cal. 619, 24 Pac. 45; an order refusing to vacate a decree of distribution of a decedent's estate, made by a district court in Montana.—*In re Kelly's Estate*, 31 Mont. 356, 79 Pac. 244; an order requiring the distributee of an estate to restore property received by him under a final decree of distribution.—*Iverson v. Superior Court*, 115 Cal. 27, 28, 46 Pac. 817; an order refusing to postpone a decree of final distribution.—*Estate of Burdick*, 112 Cal. 387, 396, 44 Pac. 734; and an order denying the petition of a wife to vacate an order of distribution and discharge of executors, where she was, prior to her husband's decease, living separate and apart from him under an agreement, and enjoying the benefit of money paid for her support during such separation, although her petition informs the court that a large part of the estate had been concealed and withheld from administration.—*Estate of Noah*, 88 Cal. 468, 472, 26 Pac. 361.

(6) **Non-appealable orders. Sales of property.**—The following orders are non-appealable: An order refusing to set aside an order for the sale of the property of an estate previously made.—*Estate of Smith*, 51 Cal. 563, 565; an order requiring an administrator to proceed with a sale as directed in a previous order.—*Stuttmeister v. Superior Court*, 71 Cal. 322, 324, 12 Pac. 270; and an order denying and dismissing a petition for an order that an executor of an estate return to the petitioner the purchase-money paid for the interest of the testator, in certain real estate, in pursuance of an order of the court confirming the sale of such real estate.—*Estate of Williams*, 3 Cal. Unrep. 788, 32 Pac. 241.

(7) **Non-appealable orders. Homesteads.**—The following orders are non-appealable: An order refusing to vacate an order setting apart a homestead to the widow of decedent.—*Estate of Cahill*, 142 Cal. 628, 629, 76 Pac. 383; and an order of a probate court setting aside its own proceedings had before a final order upon the petition of a surviving wife to have a homestead set aside to her.—*Estate of Johnson v. Tyson*, 45 Cal. 257, 259.

(8) **Non-appealable orders. Probate of wills.**—Prior to 1901, section 963, subdivision 3, of the Code of Civil Procedure of California, did not authorize an appeal from an order or judgment refusing to revoke the probate of a will.—*Estate of Hughston*, 133 Cal. 321, 322, 65 Pac. 742, 1039; *Estate of Winslow*, 128 Cal. 311, 60 Pac. 931. See *Hartmann v. Smith*, 140 Cal. 461, 467, 74 Pac. 7; *Estate of Scarboro*, 70 Cal. 147, 149, 11 Pac. 563. But see head-line 5, subd. (9), ante. A judgment refusing to admit a will to probate was not appealable before the amendment of the statute.—*Estate of Smith*, 98 Cal. 636, 33 Pac. 744; *Peralta v. Castro*, 15 Cal. 511. But see head-line 5, subd. (9), ante. An order revoking an order refusing to admit a will to probate is not appealable.—*Estate of Bouyssou*, 1 Cal. App. 657, 82 Pac. 1066, 1067.

(9) **Non-appealable orders. Discovery of assets.**—An order requiring a person charged by an administrator with having concealed or disposed of assets of the estate represented by the latter, made after examination of the former pursuant to a citation issued in a proceeding instituted under sections 7505 and 7506, Revised Codes of Montana, to make disclosure as prayed, is not appealable.—*In re Roberts' Estate*, 48 Mont. 40, 135 Pac. 909, 910.

(10) **Non-appealable orders. Discontinuance of widow's allowance.**—No appeal lies from order discontinuing a widow's allowance under a former order, such order not being contemplated by section 963 of the Code of Civil Procedure of California.—*In re Overton's Estate*, 13 Cal. App. 117, 108 Pac. 1021.

(11) **Non-appealable orders. Granting motion to vacate allowance of claim.**—No appeal lies from an order granting a motion to vacate the allowance of a claim.—*Kowalsky v. Santa Cruz County Superior Court*, 13 Cal. App. 218, 109 Pac. 158. Where a claim against an estate is in the first instance allowed by the administrator and the probate judge, and thereafter upon objections filed by an heir such allowance is set aside, such claim is then pending against such estate, and an appeal will not lie from the order of the probate judge setting aside his former allowance of the claim.—*In re Coryell's Estate*, 16 Ida. 201, 101 Pac. 724.

7. Notice of appeal.

(1) **Sufficiency of.**—A notice of appeal, "from all orders and decisions" made by a probate court on a certain day, is sufficient to cover any appealable order made on that day.—*Estate of Pacheco*, 29 Cal.

224, 226. A notice of appeal in a probate proceeding is sufficient, though it does not state the court to which the appeal is taken, where there is but one court to which the appeal could be taken, and the objection is made in that court.—*Starkweather v. Bell*, 12 S. D. 146, 80 N. W. 183, 185. There seems to be no reason why a notice of more than one appeal, in a probate proceeding, may not be in one and the same paper, where the matters appealed from are so designated that it can be seen from what the appeal is taken.—*In re Dewar's Estate*, 10 Mont. 422, 25 Pac. 1025; *Estate of Wright*, 49 Cal. 550. After the entry of judgment a motion for new trial was made embracing all the grounds urged on the appeal from the judgment. The motion was denied, but it was the evident intent of appellant's counsel to appeal both from the judgment and from the order denying the motion. It was apparent, however, that the attempted appeal from the order was ineffectual. The notice of appeal recites that defendant "appeals from the judgment and that upon such appeal defendant will ask for a review of the order overruling the motion to set aside the verdict and to grant a new trial thereof." The undertaking on appeal in no way refers to or mentions the order denying the new trial, but is merely an undertaking for the payment of the costs on the appeal from the judgment. Under the rule laid down in the case of *Sucker State Drill Co. v. Brock*, 18 N. D. 598, 120 N. W. 757, the attempted appeal from the order was held to be ineffectual, and the order denying the new trial is unappealed from, but the appeal from the judgment presents to the court the alleged errors of law occurring at the trial and preserved in the judgment-roll.—*Hedderich v. Hedderich*, 18 N. D. 488, 491, 123 N. W. 276. The affidavit accompanying a notice of appeal is sufficient if it states that the notice is made in good faith and not for the purpose of wilful delay.—*Jarrard v. McCarthy*, 95 Kan. 719, 149 Pac. 696. A party to an appeal in a probate matter from the county court to the district court is not required by statute to make the affidavit of interest; that affidavit being required only where the appeal is taken by a party in interest, who was not a party to the proceedings in the county court.—*Brock v. Kelfer*, 59 Okla. 5, 157 Pac. 88, 90.

(2) Service. Jurisdiction. Death of adverse party.—In Oregon, an appeal may be taken by serving a notice thereof on such adverse party or parties as have appeared in the action or suit.—*In re Mendenhall's Will*, 43 Or. 542, 72 Pac. 318, 319. Serving notice of appeal upon all parties who appeared at the contest of the probate of a will, including an attorney for absent heirs and creditors not otherwise represented, gives jurisdiction to hear an appeal from an order admitting such will to probate.—*Estate of Scott*, 124 Cal. 671, 674, 57 Pac. 654. Notice of motion for a new trial, or notice of appeal, need not be served upon one who is not an adverse party; as where a co-executor of the will of a husband was made defendant, because he refused to join as co-plaintiff, and who denied the interest of the

husband, but against whom no relief was granted, and who was not mentioned in the judgment for plaintiff.—*Sprague v. Walton*, 145 Cal. 228, 78 Pac. 645. The necessity of serving a notice of appeal upon a respondent who is an adverse party is not obviated by the death of such party. The appellant must, within the time allowed for taking an appeal, serve his notice of appeal upon all adverse parties. If any of said parties have died, service must be made upon the personal representatives of the decedent, and if the appellant is unable to procure the appointment of a personal representative, and to serve such representative within the required time, his appeal is lost. An "adverse party" is one "whose interest in the subject-matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken."—*Bell v. San Francisco Sav. Union*, 153 Cal. 64, 94 Pac. 225, 227.

(3) **Filing of notice and undertaking. Jurisdiction.**—A notice of appeal and undertaking having been filed within the proper time, the appellate court has jurisdiction of the cause, and whether or not it will dismiss the appeal, for defects in the undertaking, lies within the discretion of the court, the exercise of which will not be disturbed where no abuse thereof is discovered.—*Starkweather v. Bell*, 12 S. D. 146, 80 N. W. 183, 185. On appeal from the county court, in probate matters, to the circuit court, the notice of appeal and undertaking must be filed with the county judge, who has succeeded to the duties of the former probate judge.—*Starkweather v. Bell*, 12 S. D. 146, 80 N. W. 183, 185. Where a notice of appeal and undertaking filed with the county judge have not been properly indorsed, there is no error, in proceedings of the circuit court, in allowing the county judge to indorse his filing upon the papers, nor in allowing the clerk of the county court to correct his filing indorsed upon such papers to correspond with the fact.—*Starkweather v. Bell*, 12 S. D. 146, 80 N. W. 183, 185. Where the statute provides that to effect an appeal appellant must serve and file a notice of appeal and also an undertaking for appeal within thirty days after the date of the order or decree and the undertaking filed was fatally defective it was held that such defect might be cured by the filing of an amended undertaking in proper form, as the filing of a valid undertaking was not a condition precedent to the attacking of jurisdiction on appeal. Where such notice of appeal demands a trial de novo it is triable on evidence to be offered anew. The statute of North Dakota conferring upon the district court jurisdiction to try de novo probate matters appealed from the county court is not unconstitutional as violating section 111 of the constitution granting exclusive original jurisdiction to the probate court of such class of actions.—*Davidson v. Unknown Heirs of Peterson*, 22 N. D. 480, 484, 134 N. W. 751.

8. Undertaking on appeal.

(1) **In general.**—When a defective undertaking on appeal is filed, the better practice, on the part of the appellate court, when the defects of the undertaking are called to its attention, is to require the appellant to file a new undertaking.—*Starkweather v. Bell*, 12 S. D. 146, 80 N. W. 183, 185. A deposit of money, equal to the amount of the required undertaking, may be received in place of the undertaking upon appeal.—*In re McVay's Estate*, 14 Ida. 56, 93 Pac. 28; *Jarrard v. McCarthy*, 95 Kan. 719, 149 Pac. 696. In Idaho, where the probate court, in a probate matter, enters one judgment and includes therein more than one order, and the appeal is taken from the judgment, only one bond or one deposit of one hundred dollars under the statute is required.—*In re McVay's Estate*, 14 Ida. 56, 93 Pac. 28, 29. If an appeal is taken to the district court from the probate court, and the probate court fails to transmit to the district court the undertaking on appeal, or the deposit in lieu thereof, the district court may, when it is so made to appear, direct the probate court to transmit such undertaking or deposit to the district court.—*In re McVay's Estate*, 14 Ida. 56, 93 Pac. 28, 29. An undertaking on appeal stays proceedings upon the order appealed from.—*Pennie v. Superior Court*, 89 Cal. 31, 33, 26 Pac. 617; *Estate of Schedel*, 69 Cal. 241, 10 Pac. 334. Where an appeal bond in proper form and of approved security is tendered to and received by the probate judge within the time prescribed for taking appeals and is placed by him among the files in the case without indorsing it as filed, it is filed in contemplation of law.—*Ald's Estate v. Appling*, 89 Kan. 340, 131 Pac. 569. The filing of an appeal bond, by a litigant taking up a cause from the probate court to the district court for review, may not, in the absence of a statute providing therefor, be waived by the parties, the matter being one that concerns the public.—*Adair v. Montgomery (Okla.)*, 176 Pac. 911. The fact that a bond on appeal from the county court to the district court in a probate proceeding is made to the administrator, as obligee, instead of to the state, as required by statute, does not render the bond void so as to defeat jurisdiction on appeal.—*In re Barnes' Estate*, *Barnes v. Barnes*, 47 Okla. 117, 147 Pac. 504.

(2) **Application of statute. Official bond.**—The statute which permits the official bond of an executor, administrator, or guardian to stand in place of an undertaking on appeal applies only to a case in which the appellant was a representative at the time of taking the appeal. It does not apply to a case where the appealing party is not an executor, administrator, or guardian. The covenants of an administrator's bond do not make it, on its face, an undertaking on appeal. It becomes such under certain circumstances, only by virtue of the provisions of the statute. It follows that sureties on the bond of a representative are not answerable, unless the case falls strictly within the terms of the statute.—*Estate of McDermott*, 127 Cal. 450, 452, 59 Pac. 783. The statute which provides that executors, who have given an official bond,

may rely upon such a bond on appeal from orders and judgments of the superior court, in matters pertaining to the estate, etc., does not apply where there is nothing in the record to show that the defendant executor has given any official bond, and where the appeal is not one from an order made in "proceedings had upon the estate."—*Pacific Pac. Co. v. Bolton*, 89 Cal. 154, 155, 26 Pac. 650.

(3) **Bond by representative. When not required.**—If an executor or administrator, who has given an official bond, appeals from a judgment and proceedings had relative to the estate, it is not necessary for him to file a bond. His bond as a representative stands in the place of an undertaking on appeal, not only for the purpose of perfecting the appeal, but also to stay proceedings upon the order appealed from.—*Estate of Corwin*, 61 Cal. 160, 163; *Erlanger v. Danielson*, 88 Cal. 480, 26 Pac. 505, 506; *Ex parte Orford*, 102 Cal. 656, 657, 36 Pac. 928. Executors, administrators, or guardians who have given bonds in this state, with sureties, according to law, are not required to give an undertaking on appeal or proceedings in error.—*Freeman v. Hill*, 45 Kan. 435, 25 Pac. 870.

(4) **Bond by representative. When required.**—If an executor or administrator appeals in a personal matter, and not one in which the estate is interested, it is necessary for him to give a bond; as where he appeals from an order revoking his letters.—*Estate of Danielson*, 88 Cal. 480, sub nom. *Erlanger v. Danielson*, 26 Pac. 505, 506. If the executor of a deceased heir appeals, in that character, from an order distributing a portion of the estate to a legatee, it is necessary for him to give an appeal bond, because the appeal is not an appeal from an order made in the proceeding for the settlement of the estate of which the appellant is executor.—*Estate of Skerrett*, 80 Cal. 62, 63, 22 Pac. 85. If an administrator has been removed, and the court subsequently, upon the settlement of his account, renders judgment against him for a balance due the estate, he must, if he appeals, give an appeal bond, because the appeal is from a personal judgment not prosecuted for the estate, but for his own interest. It is not a probate matter, but an individual matter.—*Fuller v. Fuller's Estate*, 7 Colo. App. 555, 44 Pac. 72, 73. Where letters of administration are issued without jurisdiction, and the probate court, upon the hearing, determines and orders that they be declared null and void, the person illegally appointed as administrator is not entitled to appeal from such order without giving the appeal bond required from ordinary appellants.—*Mallory v. Burlington*, etc., R. R. Co., 53 Kan. 537, 36 Pac. 1059. An administrator may appeal from an order revoking his letters, but is not entitled to a stay of proceedings without giving a bond.—*In re Henriques*, 5 N. M. 169, 21 Pac. 80, 82. Where the law provides that an executor, administrator or guardian may appeal, without filing an undertaking, from a decree or order made in any proceeding in a case in which he has given an official bond and an order had been made revoking the probate of a will and the letters of administration issued to appellant it was held

that at the time of taking the appeal appellant was not an administrator within the meaning of the statute and was not exonerated from filing an undertaking on appeal.—*Ransier v. Hyndman*, 18 N. D. 197, 20 Ann. Cas. 415, 119 N. W. 544.

(5) **Poverty.**—Under the provisions of the Civil Code of Arizona, 1901, pars. 1948-1951, upon the filing of an affidavit by a party, that he has made diligent efforts to give an appeal bond and is unable to do so by reason of his poverty, such affidavit shall operate a perfection of the appeal in respect to the matter of costs.—*Bolen v. Superior Court*, 14 Ariz. 31, 123 Pac. 305.

9. **Jurisdiction of appeal.**—An appellate court will not entertain jurisdiction of an appeal from an order refusing to revoke an appealable order.—*Guardianship of Get Young*, 90 Cal. 77, 78, 27 Pac. 158. In case of a premature appeal, the appellate court acquires no jurisdiction of the subject-matter.—*Estate of Devincenzi*, 131 Cal. 452, 453, 63 Pac. 723. The appellate court is without jurisdiction to hear an appeal where all adverse parties have not been served with notice of appeal.—*Estate of Scott*, 124 Cal. 671, 674, 57 Pac. 654. If the probate court removes a guardian, and appoints another one in his stead, the latter is a necessary party on an appeal by the former from such order.—*Estate of Medbury*, 48 Cal. 83, 84.

10. **Filing of transcript or record.**—If, on appeal from a judgment of the superior court admitting a will to probate, the transcript is not filed within the time prescribed by the rules of court, the court may, on a sufficient showing, excuse the delay.—*Estate of Stone*, 173 Cal. 675, 161 Pac. 258. An appeal from a judgment, rendered January 14, 1898, notice of appeal and an appeal bond having been filed on said day, must be followed by a filing of the record within the time prescribed by law, unless the time has been duly extended by order of court.—*In re Estate of Bennett*, 1 Alaska 159, 161.

11. Premature appeal.

(1) **Dismissal of.**—An appeal taken, before a probate order, decree, or judgment is entered at length in the minute-book of the court, is premature and will be dismissed because the appellate court has no jurisdiction thereof.—*Estate of Devincenzi*, 131 Cal. 452, 63 Pac. 723; *Estate of Scott*, 124 Cal. 671, 57 Pac. 654; *Estate of Sheid*, 122 Cal. 528, 55 Pac. 328; *Estate of Pearsons*, 119 Cal. 27, 50 Pac. 929; *Home for Inebriates v. Kaplan*, 84 Cal. 486, 24 Pac. 119; *Estate of Rose*, 80 Cal. 166, 168, 171; *Estate of Rose*, 72 Cal. 577, 14 Pac. 369. The dismissal of a premature appeal does not operate as an affirmance of the judgment; and, as such appeal is absolutely void, it does not deprive the lower court of jurisdiction, and no stay of proceeding is effected thereby.—*Estate of Kennedy*, 129 Cal. 384, 385, 62 Pac. 64. The dismissal of an appeal, as having been taken prematurely, does not operate to exonerate the bondsmen on the undertaking given as required by law to

make the appeal effectual. The sureties, under such an undertaking, agree to be liable if the appeal be dismissed, and, as the respondent must be at some expense to have even a void appeal disposed of, there is a consideration for the undertaking.—*Estate of Kennedy*, 129 Cal. 384, 385, 62 Pac. 64. The dismissal of a premature appeal is not a bar to a second appeal, in the same case, when a record shall have been made up from which an appeal can be taken.—*Estate of Rose*, 80 Cal. 166, 171, 22 Pac. 86. An appeal from a judgment dismissing an action by an heir to revoke the probate of a will on the ground of the infancy of the heir is not abandoned because the heir on attaining full age brings a subsequent action to revoke the probate, the subsequent action not being an election of remedies.—*In re Dye's Estate*, 16 N. M. 297, 113 Pac. 840.

(2) *Entry of order. What constitutes.*—A probate order, decree, or judgment, is not "entered" until it is "entered at length in the minute-book of the court," as provided by the statute.—*Estate of Pearsons*, 119 Cal. 27, 28, 50 Pac. 929. See § 808, ante. An entry, in the clerk's register of actions, noting an entry of the decree in the minutes, but which had no reference to the fact of the entering of the decree at length in the minute-book, and was not intended to record that fact, is not an entry "at length in the minute-book of the court."—*Estate of Pearsons*, 119 Cal. 27, 29, 50 Pac. 929. The time for an appeal from a probate order begins to run only from the date of the actual entry of the order at length in the records of the court, and is determined by the statute,—not by the stipulation of the parties.—*Estate of Scott*, 124 Cal. 671, 675, 57 Pac. 654.

12. *Dismissal of appeal.*—An appeal from a non-appealable order will be dismissed by the appellate court, of its own motion, and without objection from the respondent.—*Estate of Wiard*, 83 Cal. 619, 24 Pac. 45. An appeal will be dismissed, where no undertaking on appeal is filed, although it appears from the transcript that an order was made dispensing with security on appeal.—*Estate of Danielson*, 88 Cal. 480, 481, 26 Pac. 505. An appeal from an order in a probate proceeding will be dismissed for want of diligence in prosecuting the appeal where it appears that, before the filing of the transcript, the official records were destroyed by fire, but that no effort was made for almost two years afterwards to restore the same.—*Estate of Heywood*, 154 Cal. 312, 97 Pac. 825, 827. If an appeal from an order of the probate court rests on a statement of facts alone, there being no judgment-roll, it must be dismissed, where no statement is made of the grounds of appeal. The appellant must state, specifically, the particular errors or grounds upon which he intends to rely on the appeal.—*Estate of Boyd*, 25 Cal. 511, 515. It is no ground for the dismissal of an appeal, that a defendant administrator, in whose favor a judgment was rendered in the trial court, has been convicted of embezzlement, where that question is raised for the first time on appeal.—*Brown v. Mann*, 68 Cal. 517, 9

Pac. 549, 550. In cases where a motion for a new trial may be made, an appeal will not be dismissed, on motion, because the proper procedure has not been observed. The proper motion, in such a case, is for an affirmance of the order.—*In re Davis' Estate*, 27 Mont. 235, 70 Pac. 721, 724. Where an appeal was taken from a decree of distribution and amendments to a proposed bill of exceptions were served more than two years prior to a motion to dismiss the appeal, and no other step was ever taken by the appellant, who failed to appear at the hearing of the motion to dismiss the appeal, it will be dismissed for unwarrantable laches and delay.—*Estate of Johnson*, 14 Cal. App. 376, 112 Pac. 191. An opposition by heirs to the payment of a bequest of \$200,000 on the ground that it was upon a secret trust to evade the law of charities was addressed to the jurisdiction of the court to allow the same, on a motion to dismiss an appeal by the heirs from the judgment awarding the bequest, upon the ground that the order admitting the will to probate was final, and that the heirs are not parties aggrieved by the judgment, must be denied as the determination of such question involves the merits of the appeal. The merits of a case can not be examined on a motion to dismiss an appeal.—*Estate of Sharp*, 10 Cal. App. 1, 100 Pac. 1071. Appellant is responsible for the prompt assertion of the preference given to probate matters over all other civil causes on appeal to the district court and on his failure to proceed promptly the appeal will be dismissed but the circumstances of each case are to be considered by the district court so as to avoid a peremptory or arbitrary dismissal.—*In re Shapter's Estate*, 44 Colo. 547, 99 Pac. 38. The probate court directed the jury to find against the will. Proponents appealed. The district court reversed the probate court. Contestants appealed to the supreme court, which affirmed the district court and remanded the case to that court for hearing de novo. Nothing was then done for seventeen months. Application was then made to the district court to dismiss the matter for want of prosecution. The application was granted. Appeal was taken to the supreme court and the judgment of dismissal was affirmed.—*In re Shapter's Estate*, 44 Colo. 547, 99 Pac. 39. An appeal from an order made agreeably to a petition by an executor that his co-executor be required to deliver to him, as being the managing executor, the sole management of the estate's business and the property, books, and papers relating thereto, should be dismissed on its appearing that the appellant has resigned.—*Wolfe v. Bauer* (Colo.), 180 Pac. 86. Where a will directs the executor to lease the real estate and pay the bequests of certain legatees out of the rents, and then to sell it and divide the proceeds among certain other legatees, if an ejectment and partition action be brought against all such persons and judgment therein be given the plaintiff as against only non-answering defendants, an appeal by the executor will be dismissed, since he is not trustee for these defendants; the judgment only directs him to pay to the plaintiff what he otherwise was to pay to them, and in no other respect interferes with the duties imposed.

upon him.—*McLeod v. Palmer*, 96 Kan. 159, 150 Pac. 535. Where the defendant in error, a minor, has been dead for more than one year, and plaintiffs in error have knowledge of such death, and no proceedings have been taken to revive the action, and the representatives or successors of the deceased do not consent to a revivor but move to dismiss the appeal, this court is without jurisdiction to consider the appeal and it will be dismissed.—*Norton v. Charley*, 57 Okla. 511, 512, 157 Pac. 340. There is no authority in California for an appeal in any probate matter not found in subdivision 3 of section 963 of the Code of Civil Procedure of that state, and an attempted appeal from an order not therein found is abortive, and must be dismissed.—*Estate of Seymour*, 15 Cal. App. 287, 114 Pac. 1023.

REFERENCES.

Dismissal of premature appeal.—See head-line 10, subd. (1), *supra*.

13. **Statement. Bill of exceptions. Judgment-roll.**—On appeal from a judgment, adjudging that certain persons are entitled to share in the estate of a testator, and from an order denying a new trial of the issues, where there is no substantial conflict in the evidence, and only questions of law are raised, the supreme court may act upon the record as upon an agreed statement of facts, where counsel have invited it to do so in their respective briefs.—*In re Klein's Estate*, 35 Mont. 185, 88 Pac. 798, 801. The appellate court will not review the evidence, in a proceeding in the probate court, unless it is embodied in a statement on appeal.—*Estate of Arnaz*, 45 Cal. 259, 260. The appellate court will not review an order revoking the letters of appellant, in the absence of a statement of facts or bill of exceptions.—*In re Farnham's Estate*, 41 Wash. 570, 84 Pac. 602, 603. On appeal from a determination in a probate proceeding, there can be no review, if the record does not contain any of the evidence as to the matters in controversy.—*In re Reed's Estate*, 28 Utah 465, 79 Pac. 1049, 1050. There is no such thing, technically, as a judgment-roll in probate proceedings; but, on an appeal, from an order settling and allowing the account of an administrator, the record before the court, consisting of the account, the written objections thereto, and the findings and order, certified by the clerk as the judgment-roll, with a certified copy of the notice of appeal, will constitute the judgment-roll. Other matters, not forming part of the judgment-roll, in such cases, should be incorporated in a bill of exceptions, or statement, as the case may be, following the analogies of provisions regulating records on appeal from judgments in ordinary actions.—*In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38, 39, 40. On an appeal from an order denying a motion for new trial of a contest of a will after probate, it is not essential that the papers constituting the judgment-roll or the order denying the motion should be authenticated by being embodied in a bill of exceptions. The judgment-roll in such case should include at least the petition for revocation of the probate, the answer thereto, the verdict of the jury and the judgment, and it is sufficient under section 963 of the California Code of Civil

Procedure if such papers are authenticated by the clerk's certificate.—Estate of Kilborn, 162 Cal. 4, 120 Pac. 762. On an appeal from an order admitting a will to probate a recital in the order of the giving of notice of the hearing of the petition for probate is sufficient to establish the truth of the fact recited, unless the record shows affirmatively that the recital is untrue.—Estate of Dombrowski, 163 Cal. 290, 125 Pac. 233. The order of a district court confirming an order of a county court of this state, denying a petition filed by the administrator in and under the direction of the court of the principal administration in a sister state, and in an ancillary administration in said county court of this state, asking for the sale of real estate in this state, and for the transmission of the proceeds thereof for the payment of debts proved and allowed in said principal administration, is appealable; it is a final order, affecting a substantial right, made in a special proceeding; no statement of facts is necessary on such appeal, and the petition should have been granted.—Dow v. Lillie, 26 N. D. 512, L. R. A. 1915D, 754, 144 N. W. 1082.

14. Consideration on appeal.

(1) In general.—Errors complained of on appeal will be disregarded, where no objection was made to them in the lower court.—Gillett v. Chavez, 12 N. M. 353, 78 Pac. 68, 69. The objection, that a judgment is not authorized by law, can not be considered on appeal from an order denying a motion for a new trial.—Estate of Westerfield, 96 Cal. 113, 115, 30 Pac. 1104. In the absence of a plain abuse of discretion, the action of the probate court, in removing an administrator, will not be disturbed on appeal.—Estate of Baldrige, 2 Ariz. 299, 15 Pac. 141, 143. If a probate court makes an erroneous order settling the accounts of an executor or administrator, or errs in directing distribution, an appeal may be taken, and, on such appeal, the error, if any, as to striking out the objections to the final account and the petition for distribution, may be considered.—State v. District Court, 34 Mont. 303, 87 Pac. 614, 615. If a complaint, in a probate matter, is insufficient upon any ground properly specified in the demurrer thereto, the order sustaining the demurrer must be upheld on appeal, although the lower court may have considered it sufficient, in that respect, and may have, in its order, declared it defective only in some particulars in which the appellate court holds it to be good.—Burke v. Maguire, 154 Cal. 456, 98 Pac. 21, 23. If checks returned by an administrator appear to have been signed by him as such, and are offered and received in evidence, as vouchers for some of the disbursements, without objection, complaint can not be made, on a writ of error, that the checks are not proper vouchers.—Rice v. Tilton, 14 Wyo. 101, 82 Pac. 577, 581. Where after a verdict for a plaintiff suing as administrator, a motion in arrest of judgment was sustained and judgment entered dismissing the action on the ground that plaintiff's appointment as administrator was void, which judgment was reversed by the appellate court and a judgment on the verdict directed, the only question concluded by such decision

of the appellate court was that of the validity of plaintiff's appointment, and the defendant may maintain proceedings in error after the entry of the final judgment to review questions which arose on the trial and which could not have been considered by the appellate court on the prior hearing.—*Alaska-Treadwell Gold Mining Co. v. Cheney*, 162 Fed. 593, 89 C. C. A. 351, 357.

(2) **Review of discretion.**—An appellate court will not, on appeal from an order revoking letters of administration issued to a creditor of the deceased, review the discretion of the lower court in appointing a successor.—*In re Farnham's Estate*, 41 Wash. 570, 84 Pac. 602, 603. An attorney may be appointed, in the discretion of the court, for minor heirs in probate proceedings; and though the court abused its discretion in granting a motion to vacate such an order, that is not acting without jurisdiction, or in excess of jurisdiction. If the court errs in granting such a motion its action is not reviewable on a writ of review.—*State v. District Court*, 34 Mont. 303, 87 Pac. 615. In reviewing on appeal, an order granting a nonsuit on a contest of a will, in determining whether the evidence presented was sufficient to take the case from the jury, the entire evidence presented is to be viewed from a point most favorable to the contestant. Disregard is had of any contradictory evidence. All facts supporting the case of contestant must be taken as true and all presumptions from the evidence and all reasonable inferences susceptible of being drawn therefrom must be considered as facts proven in his favor.—*Estate of Ricks*, 160 Cal. 450, 117 Pac. 532.

(3) **Presumptions.**—On appeal from an order of the probate court, if there is no bill of exceptions showing the evidence, the appellate court must take the findings of fact as absolutely true, and presume that the evidence necessary to sustain them was presented to the court below.—*Estate of Brown*, 143 Cal. 450, 77 Pac. 160, 162. On appeal from an order revoking letters testamentary and settling the semi-annual account of an administrator, it is to be presumed, on appeal, that, upon final settlement of the estate, the proper compensation will be allowed to all the executors and administrator who have taken or may take any part in the administration of the estate, and that, if anything is due to the removed administrator, the court will make the proper award to him.—*In re Courteney*, 31 Mont. 625, 79 Pac. 317, 319. Where an appeal is taken from a decree of partial distribution under the will of a deceased person on the judgment-roll, without a bill of exceptions, all presumptions upon appeal are in favor of the regularity of the judgment and decree of the trial court, and where the decree recites that no one appeared or opposed the application, and that the petitioner is the sole devisee under the will of the deceased, and that deceased left no legal heirs, the judgment must be affirmed.—*Estate of Kearney*, 13 Cal. App. 92, 109 Pac. 37.

(4) **Prerequisites for review.**—Questions not properly preserved for review, as by a failure to except, can not be considered on appeal.—*Cordingly v. Kennedy* (Colo.), 239 Fed. 645, 651, 152 C. C. A. 479. Where a foreign executor sued and obtained judgment, but the defendant appealed, an objection to the introduction of an exemplified copy of the plaintiff's letters can not be considered on the appeal, where the matter was not called to the attention of the trial court.—*Cordingly v. Kennedy* (Colo.), 239 Fed. 645, 650, 152 C. C. A. 479.

REFERENCES.

Necessity of statement or bill of exceptions.—See head-line 13, *supra*.

(5) **Review of findings.**—On an appeal from an order denying a motion for a new trial in a proceeding by executors for the settlement of the accounts and for the distribution of the decedent's estate, there being no appeal taken from the decree, the sufficiency of the findings to sustain the decree can not be reviewed.—*Estate of Keating*, 162 Cal. 406, 122 Pac. 1079. Although findings are inartistic, confusing, and apparently contradictory, if, upon careful analysis with a view to ascertaining their meaning, they are sufficiently intelligible, they will support the judgment.—*Wilkin v. O'Brien* (Utah), 176 Pac. 853, 856. The fact that two findings, considered alone, may be so confusing, and apparently contradictory, as to render their meaning unintelligible, does not necessarily vitiate the judgment based thereon, where the findings as a whole indicate the intention of the court, and, considered as a whole, satisfactorily determine that intention.—*Wilkins v. O'Brien* (Utah), 176 Pac. 853, 855. Upon consideration of the entire evidence it is held that the finding that the signature of the allottee to the deed in dispute was a forgery, and that all the defendants had knowledge of the manner in which the forged deed was obtained, was supported by the evidence, and that such finding was correct.—*Dickinson v. Abb* (Okla.), 176 Pac. 523, 525. Where a finding is contrary to a judgment or order rendered, or immaterial to it, and the judgment or order is based on other findings, the findings, contrary or immaterial, are not adjudications against the prevailing party.—*Estate of Funkenstein*, 170 Cal. 594, 150 Pac. 987.

(6) **Reversal of judgment.**—A judgment in an action against an administratrix to recover for services rendered to deceased, to the effect that plaintiff "have and recover" from the defendant, as administratrix, the amount of the verdict and costs, though defective under section 7536, Revised Codes of Montana, is not to be reversed for such infirmity.—*Gauss v. Trump*, 48 Mont. 92, 135 Pac. 910.

15. **Law of the case.**—If a case has been appealed several times, and the facts and evidence are the same as on the first trial, with immaterial exceptions, the decision upon the first appeal becomes the law of the case upon subsequent appeals.—*Snyder v. Jack*, 140 Cal. 584, 585, 74 Pac. 139, 355; *Estate of Pacheco*, 29 Cal. 224. The decision of the supreme court, in an action under a statute providing for the

distribution of the estate of a decedent, either on appeal from a part of the judgment, denying a motion to affirm an order of the district court denying a motion for a new trial, or denying a motion to dismiss an appeal from a part of the judgment, is the law of the case on the questions made by such motions.—*In re Klein*, 35 Mont. 185, 88 Pac. 798, 801. The denial of a motion to affirm an order of the district court, in the proceeding under this and the two following sections, refusing a new trial to an executor and some of the legatees, of issues found in favor of other legatees, is held not the law of the case upon final determination on the merits.—*Estate of Klein*, 35 Mont. 185, 202, 88 Pac. 798. (Citing Code Civ. Proc., § 2840.)

16. *Certiorari*.—An appealable order can not be reviewed on a writ of *certiorari*.—*Estate of McConnell*, 74 Cal. 217, 219, 15 Pac. 746, either before or after the expiration of the time allowed by law for an appeal therefrom.—*Stuttmeister v. Superior Court*, 71 Cal. 322, 323, 12 Pac. 270. On appeal from a decree removing an administrator, the sufficiency of the evidence to justify such action on the part of the court, is not reviewable on a writ of *certiorari*, if the evidence is not set forth in the petition.—*In re Henriques*, 5 N. M. 169, 21 Pac. 80. Order requiring administrator to give additional security is independent of other proceedings and reviewable only by *certiorari*.—*In re McPhee's Estate*, 10 Cal. App. 162, 101 Pac. 530.

17. *Writ of error*.—The Colorado statute provides that, if the court does not have jurisdiction to entertain an appeal, but would have, had the action come up on writ of error, the appeal shall be dismissed, and the cause re-docketed on error.—*New York Life Ins. Co. v. Brown*, 32 Colo. 365, 76 Pac. 799, 801. In Colorado, a proceeding to sell a decedent's lands, to pay debts of his estate, may be reviewed on error.—*New York Life Ins. Co. v. Brown*, 32 Colo. 365, 76 Pac. 799, 802. In Arizona, a writ of error to review a judgment against a deceased person must be prosecuted in the name of the personal representative of decedent.—*Smith v. Stilwell*, 9 Ariz. 226, 80 Pac. 333. In Arizona, a writ of error to review a judgment against a deceased person will be dismissed, if the plaintiff in error fails to file abstracts and briefs as required by the rules of court, or where he fails to make the personal representative of the defendant, in the judgment sought to be reviewed, a party to the writ.—*Smith v. Stilwell*, 9 Ariz. 226, 80 Pac. 333.

18. To circuit, or district court.

(1) *Trial de novo*.—The statute of Idaho provides that an appeal may be taken from the probate court in probate matters. "The appeal may be taken either upon questions of both law and fact. If taken upon questions of law alone, the district court may review any such question which sufficiently appears upon the face of the record or proceeding without the aid of a bill of exception, but no bill of exceptions shall be allowed or granted in the probate court in probate

matters. If the appeal be upon questions of both law and fact, the trial in the district court shall be de novo."—See Act of March 11, 1903 (Sess. Laws 1903, page 373). And "it must be assumed," said Stewart, J., on rehearing in the case of *In re McVay's Estate*, 14 Ida. 56, 93 Pac. 28, 32, that the legislature, when it passed this statute, "was acting within the purview of the constitution, and did not intend to go any further than to provide for the exercise of the 'appellate jurisdiction' of the district court." Proceeding upon that assumption, the learned justice showed that a trial "de novo" on appeal requires "that appeals be tried upon the original papers and upon the same issues had below"; and that amendments should not be allowed in the district court on appeal from the probate court in a probate matter. He said that, "the very expression, 'appellate jurisdiction,' refutes and contradicts any idea of filing new pleadings, and framing and settling issues in a court of such jurisdiction. The amendments of pleadings and filing new pleadings and joining issues suggest at once to the practitioner a court of 'original jurisdiction' as the forum in which such practice and procedure is taking place. It is a practice and procedure not usually or ordinarily invoked or countenanced in courts exercising only appellate jurisdiction, and we are not prepared to believe that the framers of the constitution ever intended to use the phrase 'appellate jurisdiction' in any uncommon, unusual, or extraordinary sense. 'Appellate jurisdiction,' as used in section 20 of the constitution, is the direct antithesis of the words 'original jurisdiction' in the same section." "If the appeal," said he, "is taken upon questions of law alone, the district court will review such questions of law as were raised in the probate court upon the record, but will not permit any new questions of law to be raised. If the district court sustains the appellant's views, then the judgment will be reversed, and the probate court directed to proceed accordingly. If, however, the district court affirms the judgment of the probate court, then the same is certified back to the probate court with the decision thereon. If the appeal be taken upon questions of both law and fact, then the district court proceeds to try, first, the questions of law, and, if the cause is reversed on questions of law, the questions of fact are not tried. If, however, the cause is not reversed on questions of law, then the same questions of fact as were tried in the probate court will be retried in the district court as other trials in said court are conducted. Witnesses may be called and may testify the same as in the trial of any other cause. In other words, this statute, under the constitution, grants to the district court appellate jurisdiction to retry only the same issues of law and fact as were heard and determined by the probate court."—*In re McVay's Estate*, 14 Ida. 56, 93 Pac. 28, 32. Though the statute provides that, on appeal from the county court to the circuit court in probate cases, "on questions of both law and fact, the trial must be de novo," yet the only issues that can be tried, on such appeal, are those presented by the record

in the county court and passed upon by that court.—In *re Skelly's Estate*, 21 S. D. 424, 113 N. W. 91, 93. If an appeal is taken to the circuit court from a county court's order appointing an administrator, and it is stipulated between counsel for the respective parties that such order of the county court may be affirmed, and the circuit court, through mistake or inadvertence, includes in its order affirming the order appealed from, matters which were not before the county court, the circuit court may afterwards set aside its order of affirmance and enter a new one; and in so doing is justified in regarding the stipulation as still in force, and need not order a trial *de novo*.—In *re Skelly's Estate*, 21 S. D. 424, 113 N. W. 91, 94. Where the county court sitting in probate had allowed part of a claim against the estate of a decedent on an appeal to the district court, the trial there should be in all respects a trial *de novo*.—*McAfee v. McAfee's Estate*, 56 Colo. 144, 136 Pac. 1052. If an appeal is taken upon questions both of law and fact from the county court to the district court in a probate matter, under section 4836, Revised Codes of Idaho, the trial in the district court is *de novo*.—*Kent v. Dalrymple*, 23 Ida. 694, 132 Pac. 303. In the trial of appeals from the county court to the district court in probate matters, while the cause is tried *de novo* in the latter court, that court has power to render such judgment only or to make such order as the county court should have made on the issues before it.—*Parker v. Lewis*, 45 Okla. 807, 811, 147 Pac. 310.

(2) Findings.—Where, on appeal from the county court to the circuit court, the order of the county court appointing an administrator is affirmed by the circuit court, no findings are necessary on which to base such judgment.—In *re Skelly's Estate*, 21 S. D. 424, 113 N. W. 91, 94.

(3) Correction, and execution of judgment.—If, on appeal to the circuit court from a county court's order appointing an administrator, in a case where a number of parties, claiming to be the heirs to the estate, had filed petitions in the county court, and were proceeding to establish their claims as heirs of said estate, the circuit court, in affirming the order of the county court, by mistake or inadvertence, includes matters as to heirship and final distribution, which were not before the county court, and the claimants all join in an application for an order to show cause why such judgment of affirmance should not be vacated, set aside, and corrected, so that they can properly present their claims as such heirs, this showing is sufficient to authorize the circuit court to correct the judgment appearing to have been made by it, determining who were such heirs, when, in fact, it had rendered no such judgment.—In *re Skelly's Estate*, 21 S. D. 424, 113 N. W. 91, 94. If, on appeal from a county court to a circuit court, from an order of the county court directing that letters of administration issue to a person named, the circuit court, through mistake or inadvertence, includes in its order of affirmance matters which were not before the county court, such judgment may be cor-

rected on motion made within the time prescribed by the statute providing for the relief of a party from a judgment or order taken against him through his mistake, inadvertence, etc., by entering a new order vacating such order, and rendering the judgment intended to be rendered on the appeal from the order of the county court.—*In re Skelly's Estate*, 21 S. D. 424, 113 N. W. 91, 93. If, on appeal to the circuit court, from a county court's order appointing an administrator, the judgment of affirmance, through mistake or inadvertence, includes matters which were not before the county court, the circuit court, on vacating its order of affirmance, may enter a new order of affirmance, *nunc pro tunc*, where no rights of third parties are affected by entering the corrected judgment, as of the date of the original but erroneous one.—*In re Skelly's Estate*, 21 S. D. 424, 113 N. W. 91, 94. A judgment entered in the district court, in a probate matter, on appeal from the probate court, is to be executed by the district court certifying such judgment to the probate court, with direction to execute the same in accordance with the terms thereof.—*In re McVay's Estate*, 14 Ida. 56, 93 Pac. 28, 29.

19. *Alternative method.*—When chapter 1, title XIII, part II of the California Code of Civil Procedure relating to appeals in general was enlarged by the addition of the new sections furnishing an alternative method of taking appeals, these sections, both by the generality of their language and by the terms of section 1714 of that code, were carried over and made a part of probate proceedings, but, like the provisions which they supplemented, only in so far as they were consistent with the rules laid down in the title governing probate proceedings. The appellant may follow the method laid down in the new sections, and may perfect an appeal by filing a notice, without serving it or filing an undertaking. But in the matter of time for taking an appeal, section 1715 still remains in force.—*Estate of Brewer*, 156 Cal. 89, 103 Pac. 486. An order appointing an executor or administrator is appealable under the new and alternative method of appeal, provided for in sections 941a, 941b, and 941c of the Code of Civil Procedure of that state, and pending the appeal the appointee can take no steps under the order.—*Estate of Stough*, 173 Cal. 638, 161 Pac. 1.

20. *Effect of appeal.*—Upon an appeal which stays proceedings the subject-matter involved is removed from the jurisdiction of the lower court until the appeal has been determined, so that a county court has no jurisdiction, pending appeal to the district court from an order transferring a guardianship proceeding to the county court of another county, to transmit certified copies of its proceedings to such other court and such court on receiving them is without jurisdiction to act.—*Burnett v. Jackson*, 27 Okla. 275, 111 Pac. 194.

REFERENCES.

Orders and decrees, citations, trial, and costs.—See note on probate practice and procedure, following § 842, *ante*.

PART XXI.
VARIOUS PROVISIONS OF THE CODES, AND
MISCELLANEOUS FORMS.

CHAPTER I.

MISCELLANEOUS PROVISIONS AND FORMS.

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- § 1102. Form. Brief description of parcels.
- § 1103. Form. Description by course and distance.
- § 1104. Form. Order requiring notice of application for restoration of records, and of the setting of said application for hearing.
- § 1105. Form. Notice of application to restore destroyed records, by order of court, and of time and place fixed for hearing. (Case of entire destruction.)
- § 1106. Form. Notice of application to restore destroyed records, by order of court, and of time and place fixed for hearing. (Case of partial destruction.)
- § 1107. Form. Complaint to cancel, annul, and set aside deeds, with prayer for an accounting and injunction, and for the appointment of a receiver. (In action brought by heirs against widow, both as an individual and as special administratrix.)

TESTIMONY OF PARTIES, OR PERSONS INTERESTED, FOR OR AGAINST REPRESENTATIVES, SURVIVORS, OR SUCCESSORS IN TITLE OR INTEREST OF PERSONS DECEASED OR INCOMPETENT.

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| <p>1. Application of statute.</p> <ul style="list-style-type: none"> (1) In general. California statute. (2) Statutes of other states. Alaska. (3) Same. Arizona. (4) Same. Kansas. (5) Same. Montana. (6) Same. Nevada. (7) Same. New Mexico. (8) Same. South Dakota. (9) Same. Utah. (10) Same. Washington. (11) Equal footing, and equal balance of disadvantages. (12) Meaning of terms. <p>2. Particular matters to which statute does not apply.</p> <ul style="list-style-type: none"> (1) In general. (2) Claim in favor of estate. (3) Controversies as to relative rights of heirs or devisees. (4) Actions to quiet title. | <p>3. Who are competent.</p> <ul style="list-style-type: none"> (1) In general. (2) Parties not interested. (3) Party may testify to what in general. (4) Party may testify to what in particular. (5) Employees, clerks, agents, etc. (6) Officers and stockholders of corporations. (7) Widow of deceased. (8) Competency in other particular instances. In general. (9) Same. Contest of will or of its probate. (10) Same. Promissory notes, mortgages, and foreclosure. <p>4. Sufficiency of evidence.</p> <p>5. Who are incompetent.</p> <ul style="list-style-type: none"> (1) In general. |
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| (2) Executors and administrators. | (9) Specific performance. |
| (3) Purpose of statute and duty of court. | (10) Implied contract. |
| (4) Parties can not testify to what in general. | (11) Deeds. |
| (5) Parties can not testify to what in particular. | (12) Claims against estate. |
| (6) Partnership affairs, in general. | (13) Same. Physician's services to deceased. |
| (7) Action by or against surviving partner. | (14) Fraud. |
| (8) Action on note indorsed to partnership. | (15) Gifts. |
| | (16) Promissory notes. |
| | (17) Establishment and enforcement of trusts. |
| | (18) Contest of will, or of its probate. |
| | (19) Incompetency in other particular instances. |

§ 1065. Who may own property.

Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state.—*Kerr's Cyc. Civ. Code.*, § 671.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho—Compiled Statutes of 1919, section 5327.

Kansas—General Statutes of 1915, section 121 (constitution).

North Dakota*—Compiled Laws of 1913, section 5256.

Oregon—Lord's Oregon Laws, section 7172.

South Dakota*—Compiled Laws of 1913, section 2686.

Washington—Remington's 1915 Code, section 8775.

Wyoming—Constitution, article 1, section 29; Compiled Statutes of 1910, section 4192; as amended and re-enacted by Laws of 1913, chapter 37, page 29.

Deeds.

1. In general.—The general rule is that the law has placed no restriction or limitation on the husband's right to make such disposition of his personal property during his lifetime as he may elect.—*Osborn v. Osborn*, 102 Kan. 890, 893, 172 Pac. 23. Deeds of real estate conveying to a married man life estates and to his sons remainders in fee, considered, and held not to be colorable.—*Osborn v. Osborn*, 102 Kan. 890, 893, 172 Pac. 23. Without actual fraud in procuring a wife to join in a conveyance of her husband's land, giving her a clear right to impound the consideration received by him or to control its use, she can not pursue the fund.—*Osborn v. Osborn*, 102 Kan. 890, 894, 172 Pac. 23. Money paid a married man as the consideration for a conveyance of his real estate, in which his wife joins, belongs to him, unless it be definitely agreed that a specific portion shall belong to her individually.—*Osborn v. Osborn*, 102 Kan. 890, 893, 172 Pac. 23. A judgment cancelling a petitioner's deeds to land, and predicated upon the erroneous assumption that he had some right, title, or inter-

est in or to such lands, which he never had, will be reversed.—*Lovett v. Jeter*, 44 Okla. 511, 513, 145 Pac. 334.

2. *Delivery*.—Evidence that the owner of real estate signed and acknowledged a deed thereto purporting to take effect at her death, that she retained it in her possession for about three years, and that she then, two weeks before she died, gave it to a custodian with other papers, in a sealed envelope, with a request that he put them in his safe, giving him no other instructions and no information as to the character of the contents of the envelope, is held not to establish a delivery of the deed.—*Rust v. Rutherford*, 101 Kan. 495, 496, 167 Pac. 1056.

3. *Valid transfer, not a testamentary disposition*.—A deed conveying real estate made by a person over 71 years old, feeble, and then suffering from an illness from which he died ten days later, to his nephews, in reliance upon their verbal promise to carry out his wishes as to the payment of certain sums of money to third parties to whom he owed no legal obligation, was not an attempt to make a testamentary disposition of such real estate, but constituted a valid transfer thereof.—*Ellis v. Funk*, 32 Cal. App. 426, 429, 163 Pac. 332.

4. *Innocent purchaser, without notice*.—One who, in a transaction of exchange of properties, has accepted land as to which deeds, wherein infants are named as grantees, have been executed but withheld from record, is not, in law, an innocent purchaser without notice, if the circumstances of the transaction have been such as would put a reasonable person upon inquiry.—*Gappmayer v. Wilkenson* (Utah), 177 Pac. 763.

5. *Indian conveyances. In general*.—Neither section 5 of the act of congress of April 26, 1906, nor section 32 of the act of June 25, 1910, operated or was intended to govern the devolution of allotted lands of deceased Indians belonging to the Five Civilized Tribes, but has for its object the providing of a uniform method and procedure for issuing deeds and patents to the allotments of such deceased Indians.—*McDonald v. Ralston* (Okla.), 166 Pac. 405, 408. The supreme court will not take judicial knowledge of the degree of Indian blood possessed by a minor Creek Indian, and will not presume that said minor is of such degree of Indian blood as to render his conveyance of lands inherited by him subject to the requirement of section 9 of the act of congress of May 27, 1908, which provides that death of the allottee removes all restrictions upon the alienation of allotted lands, and that conveyances of the interest of a full-blood Indian heir of such lands shall be approved by the court having jurisdiction of the settlement of the estate of the deceased allottee.—*Moffet v. Jones* (Okla.), 169 Pac. 652, 655. A deed by an illiterate Creek freedwoman, of the major part of her allotment, made one week after the discharge of her legal guardian, to her stepfather and former guardian, and with whom she at the time resided, and who,

at the time, was her attorney in fact, and in control of her allotted lands, in consideration of her support by said grantee during her minority, it not appearing that she was advised of her legal rights, is constructively fraudulent; and in order to bind her, it must appear that she acted after the termination of her legal disability, with deliberation and full knowledge of all the material facts respecting her rights.—*Daniel v. Tolon*, 53 Okla. 666, 157 Pac. 756, 759. The making of a contract to convey in violation of the provisions of section 16 of the act of congress of June 30, 1902, and of section 19 of the act of congress of April 26, 1906, is not to be inferred alone from the fact that the heirs executed a deed for the restricted land during the period of restrictions, and the grantee caused the deed to be recorded, and after the removal of the restrictions a deed was executed to the same grantee, but the making of such a prohibited contract must be found from all the facts connected with the transaction.—*Oates v. Freeman*, 57 Okla. 449, 467, 157 Pac. 74.

6. Same. Validity and title.—Deeds executed by a minor Creek Indian allottee attempting to convey his allotted lands are absolutely void, and no rule of estoppel operates to prevent the assertion of their invalidity.—*Parks v. Berry*, *Berry v. Parks* (Okla.), 169 Pac. 884. A purchaser from a Creek Indian allottee, of his allotted lands, the restrictions on such lands having been removed, after the allottee has attained his majority, takes title free from any claims that may be made by reason of any attempted conveyances or transactions in regard to said lands made or consummated during the minority of said allottee.—*Parks v. Berry*, *Berry v. Parks* (Okla.), 169 Pac. 884. Where after the passage of the act of congress of May 27, 1908, a member of the Choctaw nation, of one-fourth Indian blood, during his minority executes and delivers a contract for the sale of a portion of his allotment, and at the same time delivers a warranty deed to the same person, such deed and contract is absolutely void; but said allottee may, on reaching his majority, make a valid conveyance to the same party for a lawful and independent consideration, notwithstanding the first attempted conveyance.—*Jones v. Smith* (Okla.), 172 Pac. 785. Where a freedman citizen of the Cherokee nation executed new deeds, after attaining his majority, and after the approval of the act of congress of May 27, 1908, to the grantee named in the original void deeds made during minority and prior to the approval of such act, there being no restrictions on his power to alienate at the time of the execution of the second deeds, and the deeds being regularly executed and no equitable ground urged in a suit to set them aside, the grantee acquired title to the lands conveyed.—*Campbell v. Daniels* (Okla.), 173 Pac. 517. Upon application made under the provisions of section 9 of the act of congress of May 27, 1908, to the county court having probate jurisdiction, to approve the deed of a full-blood Choctaw Indian heir of a deceased Choctaw Indian purporting to grant all the estate of such Indian heir in the lands described therein, the county

court erroneously found that such Indian heir had only a life estate in such lands, and made an order approving the deed. In an action by an heir of such Indian heir after the latter's death to recover his interest in the remainder of said lands, it is held that the approval of the deed by the county court gave it validity, and it conveyed all the estate of the grantor, and that the act of the county court in approving the deed was not judicial, and that the findings formed no part of the order of approval and may be treated as surplusage.—*Buck v. Simpson* (Okla.), 166 Pac. 146, 148.

7. Same. Rescission, cancellation, or setting aside.—Assuming that plaintiff, a minor citizen of the Choctaw nation, had no right to rescind a sale of her allotted lands without restoring the consideration, it is held that the tender made was sufficient; and that aside from this, she is not required to make a tender if the deed is void, or in the absence of a showing that at the time she brought suit she had in her possession any of the consideration received.—*Bridges v. Rea* (Okla.), 166 Pac. 416, 419. Deeds executed by a three-eighths-blood Cherokee, after attaining her majority, being voluntary conveyances of lands allotted to her as a member of the Cherokee nation, and made for the purpose of perfecting title to said land according to a deed executed by her to the same lands during her minority for a valuable consideration, are valid and binding deeds, and not subject to cancellation by such Cherokee in a suit instituted by her for that purpose, there being no proof of fraud, duress, or mistake in their execution.—*Armstrong v. Goble* (Okla.), 176 Pac. 530, 531. In an action to set aside a void conveyance to the lands of a minor Indian allottee it is not necessary for plaintiff to plead a formal tender and offer to return the consideration received therefor as a condition precedent to maintaining such action.—*Bell v. Fitzpatrick*, 53 Okla. 574, 157 Pac. 334, 335. In a suit by a minor in ejectment and to set aside for fraud certain proceedings of the probate court resulting in the sale of her allotment as a citizen of the Choctaw nation, and to clear her title thereto, the evidence is held sufficient to justify the court in setting aside such proceedings and declaring said deed void.—*Bridges v. Rea* (Okla.), 166 Pac. 416, 417. The statute of limitations does not begin to run against an action by a minor Indian allottee to set aside a conveyance of his or her allotted lands, executed after the approval of the act of congress of May 27, 1908, until such minor has attained his or her majority, as shown by the enrollment records of the Commissioner to the Five Civilized Tribes.—*Bell v. Fitzpatrick*, 53 Okla. 574, 157 Pac. 334, 336.

8. Avoidance of deed in general.—In a suit brought to cancel, for lack of consideration, a deed from two women to their half-brother, which deed is a quitclaim, executed during the settlement of the estate of their mother, who died intestate, since it does not appear that any fraud was involved in the transaction, and the proof being that the mother's wish, as orally expressed, was that her property should be

equally divided between the children, it is held that the understanding was, as claimed by the plaintiffs, that the grantee should deed other property to the grantor.—*Salt v. Anderson*, *Womach v. Anderson* (Wash.), 180 Pac. 873. If a deed is made to an alien, contrary to the statute, the state only can interfere to avoid it, and even the state can not so interfere after due conveyance by the alien to a citizen.—*Keene v. Zindorf*, 81 Wash. 152, 142 Pac. 484. In a suit by an administrator to set aside a deed made by his intestate to the defendant, where mental incompetency and susceptibility to influence by others constituted the principal issue, letters and documents as well as other matters tending to show the intelligence, judgment, mental force, and capacity of the party charged with mental deficiency were not only material but might have been the most satisfactory evidence available to establish the truth or the falsity of the charge.—*Grieve v. Howard* (Utah), 180 Pac. 423. A conveyance of land comprising one-tenth of her total estate by a widow of 78 years of age with nine children, to one of her sons, who lived with her and attended to her business affairs, for a nominal consideration and the expectation, without any binding promise, that he would provide a home for her on the premises, made of her own volition not induced by persuasion or pressure on the part of her said son, is held to be evidence of mental incompetency on the part of the grantor.—*In re Watson*, *Watson v. Watson*, 176 Cal. 342, 344, 168 Pac. 341.

REFERENCES.

Validity of conveyance by minor Indians.—See note, ante, on guardianship of minors, following table after § 69.

§ 1065.¹ Aliens, property rights of.

1. OWNERSHIP OF LAND.—All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit, and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

2. RIGHT TO ACQUIRE AND LEASE LANDS.—All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise, and may in addi-

tion thereto lease lands in this state for agricultural purposes for a term not exceeding three years.

3. **RIGHT OF COMPANIES OR CORPORATIONS HAVING ALIEN MEMBERS.**—Any company, association, or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens, other than those specified in section one of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy, and convey real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise, and may in addition thereto lease lands in this state for agricultural purposes for a term not exceeding three years.

4. **WHEN PROBATE COURT MAY ORDER LANDS SOLD.**—Whenever it appears to the court in any probate proceeding that by reason of the provisions of this act any heir or devisee can not take real property in this state which, but for said provisions, said heir or devisee would take as such, the court, instead of ordering a distribution of such real property to such heir or devisee, shall order a sale of said real property to be made in the manner provided by law for probate sales of real property, and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such real property.

5. **LANDS ILLEGALLY ACQUIRED TO ESCHEAT TO STATE.**—Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association, or corporation mentioned in section three of this act, shall escheat to, and become and remain the property of, the state of California. The attorney-general shall institute proceedings to have the escheat of such real prop-

erty adjudged and enforced in the manner provided by section four hundred and seventy-four of the Political Code and title eight, part three of the Code of Civil Procedure. Upon the entry of final judgment in such proceedings, the title to such real property shall pass to the state of California. The provisions of this section and of sections two and three of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon, or interest in such property, so long as such real property so acquired shall remain the property of the alien company, association, or corporation acquiring the same in such manner.

6. LEASEHOLD ILLEGALLY ACQUIRED TO ESCHEAT TO STATE.—Any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association, or corporation mentioned in section three of this act, shall escheat to the state of California. The attorney-general shall institute proceedings to have such escheat adjudged and enforced as provided in section five of this act. In such proceedings the court shall determine and adjudge the value of such leasehold, or other interest in such real property, and enter judgment for the state for the amount thereof together with costs. Thereupon the court shall order a sale of the real property covered by such leasehold, or other interest, in the manner provided by section one thousand two hundred and seventy-one of the Code of Civil Procedure. Out of the proceeds arising from such sale, the amount of the judgment rendered for the state shall be paid into the state treasury and the balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein.—*Cal. Stats. 1913, ch. 113, p. 206.*

§ 1065.² No limitation to certain actions to recover money.

To actions brought to recover money or other property deposited with any bank, banker, trust company, building and loan association, or savings and loan society there is no limitation.

This section shall not apply to banks, bankers, trust companies, building and loan associations, and savings and loan societies which have become insolvent and are in process of liquidation and in such cases the statute of limitations shall be deemed to have commenced to run from the beginning of the process of liquidation; provided, however, nothing herein contained shall be construed so as to relieve any stockholder of any banking corporation or trust company from stockholder's liability as shall, at any time, be provided by law.—*Kerr's Cyc. Code Civ. Proc.*, § 348.

§ 1066. Minors, who are.

Minors are: 1. Males under twenty-one years of age; 2. Females under eighteen years of age.—*Kerr's Cyc. Civ. Code*, § 25.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska—Compiled Laws of 1913, section 460.
- Colorado—Mills's Statutes of 1912, section 7910.
- Idaho*—Compiled Statutes of 1919, section 4583.
- Kansas—General Statutes of 1915, section 6357.
- Montana*—Revised Codes of 1907, section 3584.
- North Dakota—Compiled Laws of 1913, section 4335.
- Oklahoma—Revised Laws of 1910, section 879.
- Oregon—Lord's Oregon Laws, section 7097.
- South Dakota—Compiled Laws of 1913, section 2509.
- Utah—Compiled Laws of 1907, section 1541.
- Washington—Remington's 1915 Code, section 8743.

§ 1067. Legitimacy of children born in wedlock.

All children born in wedlock are presumed to be legitimate.—*Kerr's Cyc. Civ. Code*, § 193.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 3738.

North Dakota*—Compiled Laws of 1913, section 4420.

Oklahoma*—Revised Laws of 1910, section 4364.

Oregon—Lord's Oregon Laws, section 798, 799 (32 subd.).

South Dakota—Compiled Laws of 1913, section 2601.

Wyoming—Compiled Statutes of 1910, section 3941.

§ 1068. Who may dispute legitimacy of child.

The presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact.—*Kerr's Cyc. Civ. Code*, § 195.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 3740.

North Dakota*—Compiled Laws of 1913, section 4422.

Oklahoma*—Revised Laws of 1910, section 4366.

South Dakota*—Compiled Laws of 1913, section 2602.

Wyoming—Compiled Statutes of 1910, section 3941.

§ 1069. Posthumous children.

When a future interest is limited to successors, heirs, issue, or children, posthumous children are entitled to take in the same manner as if living at the death of their parents.—*Kerr's Cyc. Civ. Code*, § 698.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska—Compiled Laws of 1913, section 607.

Colorado—Mills's Statutes of 1912, section 7839.

Idaho*—Compiled Statutes of 1919, section 5332.

Montana*—Revised Codes of 1907, section 4452.

Nevada—Revised Laws of 1912, section 1058.

North Dakota*—Compiled Laws of 1913, section 5276.

Oklahoma—Revised Laws of 1910, section 8433.

§ 1070. Children born after dissolution of marriage.

All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage.—*Kerr's Cyc. Civ. Code*, § 194.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 3739.
 North Dakota—Compiled Laws of 1913, section 4421.
 Oklahoma—Revised Laws of 1910, section 4365.
 Wyoming—Compiled Statutes of 1910, section 3941.

§ 1071. Children of annulled marriage.

A judgment of nullity of marriage does not affect the legitimacy of children begotten before the judgment.—
Kerr's Cyc. Civ. Code, § 84.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Colorado—Mills's Statutes of 1912, section 2240.
 Idaho—Compiled Statutes of 1919, section 4622.
 Kansas—General Statutes of 1915, section 7585.
 Montana—Revised Codes of 1907, section 3633.
 New Mexico—Statutes of 1915, section 3434.
 North Dakota—Compiled Laws of 1913, section 4370.
 Oklahoma—Revised Laws of 1910, section 4365.
 South Dakota—Compiled Laws of 1913, section 2555.
 Wyoming—Compiled Statutes of 1910, sections 3942-3944.

§ 1072. Accumulation of income.

An accumulation of the income of property, for the benefit of one or more persons, may be directed by any will or transfer in writing sufficient to pass the property out of which the fund is to arise, as follows:

1. If such accumulation is directed to commence on the creation of the interest out of which the income is to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; or,

2. If such accumulation is directed to commence at any time subsequent to the creation of the interest out of which the income is to arise, it must commence within the time in this title permitted for the vesting of future interests, and during the minority of the beneficiaries, and terminate at the expiration of such minority.—
Kerr's Cyc. Civ. Code, § 724.

§ 1073. Other directions, when void in part.

If in either of the cases mentioned in the last section the direction for an accumulation is for a longer term than during the minority of the beneficiaries, the direction only, whether separable or not from other provisions of the instrument, is void as respects the time beyond such minority.—*Kerr's Cyc. Civ. Code*, § 725.

§ 1074. Application of income to support, etc., of minor.

When a minor for whose benefit an accumulation has been directed is destitute of other sufficient means of support and education, the proper court, upon application, may direct a suitable sum to be applied thereto out of the fund.—*Kerr's Cyc. Civ. Code*, § 726.

§ 1075. Infant, etc., to appear by guardian.

When an infant, or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending, in each case. A guardian ad litem may be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant, insane, or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him.

MAY COMPROMISE.—The general guardian ad litem so appearing for any infant, or insane, or incompetent person in any suit shall have power to compromise the same and to agree to the judgment to be entered therein or against his ward, subject to the approval of the court in which such suit is pending.—*Kerr's Cyc. Code Civ. Proc.*, § 372.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Colorado—Mills's Statutes of 1912, section 7883; as amended by Laws of 1915, chapter 173, page 488.

§ 1076. Guardian, how appointed.

When a guardian ad litem is appointed by the court, he must be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons, or if under that age, or if he neglect so to apply, then upon the application of a relative or friend of the infant, or of any other party to the action.

3. When an insane or incompetent person is a party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding.—*Kerr's Cyc. Code Civ. Proc.*, § 373.

Guardian ad litem.

1. Who is, virtually.—One who has been appointed by a probate judge as an attorney for minor defendants, after service of citation, to represent the minors upon a contest as to the validity of a will, is virtually a guardian ad litem, although he is not called by that name.—*Carpenter v. Superior Court*, 75 Cal. 596, 600, 19 Pac. 174. Judgment obtained by one assuming to act as guardian ad litem is not void, and no proof of appointment is essential.—*Skinner v. Knickrehm*, 10 Cal. App. 596, 102 Pac. 947.

2. Appointment, and duty of court.—The law in relation to the appointment of a general guardian does not interfere with the power of the court to appoint a guardian ad litem.—*Hyndman v. Stowe*, 9 Utah 23, 33 Pac. 227, 229; and where a minor heir has no guardian, it becomes the duty of the court, before proceeding to act, to appoint some disinterested person as guardian, for the sole purpose of appearing for him and to take care of his interests.—*Townsend v. Tallant*, 33 Cal. 45, 52, 91 Am. Dec. 617, 620; but a guardian ad litem should not be allowed to admit away the rights of his ward.—*Waterman v. Lawrence*, 19 Cal. 210, 217, 79 Am. Dec. 212. It is the duty of the court to protect the rights of an infant, although he appears by a guardian ad litem, and no pleading by the guardian, which has the effect of surrendering the infant's rights, or of prejudicing his interests, should be permitted or considered; especially where it is not only subversive of all his inter-

est, but is not necessary to the presentation and protection of any of his rights.—*Seaton v. Tohill*, 11 Colo. App. 211, 53 Pac. 170, 172. In determining whether a guardian ad litem was appointed for an infant, the court will not go outside of the record.—*Batchelder v. Baker*, 79 Cal. 266, 21 Pac. 754. It is not necessary that there should be a new guardian ad litem every time a pleading is amended.—*Carpenter v. Superior Court*, 75 Cal. 596, 600, 19 Pac. 174. The probate court has no authority to appoint attorneys for absent or minor heirs. Where the administrator applies for leave to sell lands to pay debts, and there are minor heirs with no general guardian, a guardian ad litem, and not an attorney, must be appointed for the sole purpose of representing the minor heirs, before action can be taken upon such petition.—*Townsend v. Tallant*, 33 Cal. 45, 52, 91 Am. Dec. 617, 620. A court of law has no authority, in the absence of statute, to allow fees, in the nature of counsel fees, to guardians ad litem to be paid by the opposite party.—*Allen v. Lucas*, 15 Haw. 52, 56. The guardian ad litem of a minor is the arm of the court extended to protect the minor, who is incapacitated to look after his own interests; and when, in order to guard the minor's rights, it becomes necessary the court should direct the guardian ad litem to make all persons parties to the litigation, whose presence is necessary to give the court jurisdiction to grant proper and adequate relief to the minor.—*American Inv. Co. v. Brewer (Okla.)*, 181 Pac. 294. Where it develops at the trial that a plaintiff is a minor and his counsel moves for the appointment of a guardian it is error for the court to dismiss the case on defendant's motion. The appointment of a guardian ad litem is a matter within the discretion of the court and on motion it became its duty to appoint a guardian ad litem or allow the case to proceed as it had begun. Judgments rendered for or against minors are not void but voidable.—*Kongsbach v. Casey*, 66 Wash. 643, 120 Pac. 108. The discretion of the court to be exercised in respect of permitting or refusing to permit an action to proceed, by appointing or refusing to appoint a guardian, does not extend to a refusal to make the appointment and to assume jurisdiction of the action when a prima facie right to prosecute it is made to appear. It is the duty of the court to guard carefully the rights of those who can not act upon their own judgment.—*State v. District Court*, 38 Mont. 166, 129 Am. St. Rep. 636, 35 L. R. A. (N. S.) 1098, 99 Pac. 291, 295. Where a father who is, at the time, the regularly appointed general guardian of his minor children, petitions the court to partition and set over to him as his separate property his one-half of the community property, owned by himself and wife at the time of her death, the appointment of a guardian ad litem for the minors is not only proper but necessary, the interests of the general guardian and of the children being adverse.—*Ponti v. Hoffman*, 87 Wash. 137, 151 Pac. 249. No prejudice can result where a guardian ad litem is appointed as soon as the court's attention is called to the fact that the defendant is a minor, and where all of the defendant's rights were fully protected

previously, so far as such a guardian could have protected them.—*State (ex rel. Botts) v. Stout*, 101 Kan. 600, 168 Pac. 853. The omission to appoint a guardian ad litem of an infant plaintiff, before the bringing of the action, is not a jurisdictional defect, but only an irregularity; and if the guardian is appointed nunc pro tunc later, when on motion for a new trial the omission is first called to the court's notice, it is sufficient, provided, the guardian so appointed comes into court and accepts the judgment.—*Trask v. Boise King Placers Co.*, 26 Ida. 290, 142 Pac. 1073. There being no statute in the territory of Hawaii providing for or controlling the appointment of guardians ad litem the courts of that territory proceed upon their inherent authority, and the appointment of a guardian ad litem of minor defendants need not be made by a formal order. Any action on the part of the court whereby a person assuming to act as a guardian ad litem is recognized as such is equivalent to an appointment.—*Lakua v. Manala*, 21 Haw. 160.

3. No presumption as to appointment.—Where there is a petition for leave to sell real estate, and there are minor heirs with no general guardian, it is the duty of the court to appoint a guardian to represent them before the petition shall have been acted on; and if the record fails to show that a guardian ad litem was appointed, it will not be presumed that such a guardian was appointed.—*Townsend v. Tallant*, 33 Cal. 45, 52, 91 Am. Dec. 617.

4. Validity of appointment.—If a court appoints a guardian ad litem of a minor sixteen years of age, upon the application of the guardian alone, and the minor does not exercise, and is not given an opportunity to exercise, his right of nomination, the order is erroneous, but not void. And in such a case, if the minor, after attaining his majority, affirmed the proceedings instituted by his guardian, he thereupon becomes bound thereby, and the defect is cured.—*Johnston v. Southern Pac. Co.*, 150 Cal. 535, 11 Ann. Cas. 841, 89 Pac. 348, 350. The provisions of the statute relating to the appointment of guardians ad litem, where infants are parties, apply only where there is no general guardian, or where he does not act. Cases frequently arise where the interests of the minors are best subserved by the special appointment of a guardian ad litem, even though he may have a general guardian. In such cases the court would make a special appointment; but where the court does not specially appoint for the particular action, the general guardian may appear, and it is his duty to appear, for his ward.—*Gronfier v. Puymiroi*, 19 Cal. 629, 632. The two positions—that of administrator and that of guardian of an infant heir—are not necessarily incompatible, so far as general uses are concerned; but where the administrator seeks to divest the title of the heir by a sale under an order of court, his position is hostile to the heir, and he can not represent the heir, but a guardian ad litem should be appointed for the sole purpose of appearing for the heir and of taking care of his interests.—*Townsend v. Tallant*, 33 Cal. 45, 52, 91 Am. Dec. 617, 620. The power of a valid authorization to bring suit for specific injuries

is not exhausted by a nonsuit as to the original defendant and the substitution of a new one.—*Skinner v. Knickrehm*, 10 Cal. App. 596, 102 Pac. 947.

5. *Application of statutes.*—Provisions of the statute on parties to civil actions, in relation to guardians ad litem for minor defendants, do not apply to probate proceedings. For some purposes, probate proceedings are not "civil actions." So far as the appointment of an attorney to "represent" the minor is concerned, that matter is governed by the special proceedings providing for such appointment.—*Carpenter v. Superior Court*, 75 Cal. 596, 599, 19 Pac. 174. The courts of probate of the territory of Hawaii, in the matter of the care and supervision of the estate of minors, possess, except as modified by statute, all the powers which the court of chancery in England possessed under the common law.—*Hoare v. Allen*, 13 Haw. 257, 262. Under the California statute, the court may appoint a guardian ad litem "in any case, when it is deemed by court in which action or proceeding is prosecuted, or by judge thereof, expedient to represent infant."—*In re Snowball's Estate*, 156 Cal. 235, 104 Pac. 446. At common law an infant plaintiff sued by guardian ad litem but under the laws of Montana he sues either by his general guardian or a guardian ad litem.—*Melzner v. Northern Pac. Ry. Co.*, 46 Mont. 162, 127 Pac. 146, 148. The statutes of Utah contemplate and provide for the appointment of a guardian ad litem for resident and non-resident minor plaintiffs as well as resident and non-resident minor defendants.—*Schuyler v. Southern Pac. Co.*, 37 Utah 581, 109 Pac. 458, 461. Under the statute of Oklahoma, a minor may institute and prosecute a suit in a justice court by some adult as his next friend or by guardian ad litem appointed by the justice before whom the action is brought.—*Hill v. Reed*, 23 Okla. 616, 103 Pac. 855. It is the statutory rule in Oklahoma, also in Kansas, from which state the Oklahoma statute was taken, that the initiative in the selection of a next friend or guardian for an infant plaintiff is with the infant himself and not the court, but the court does have subsequent and supervisory power to dismiss an action when brought by the next friend, if it is not for the benefit of the infant, or to substitute the guardian of the infant, or any person as the next friend.—*Gillespie v. Collier* (Okla.), 224 Fed. 298, 300, 139 C. C. A. 534. In appointing a guardian ad litem, to sue for a minor, the court must follow the statutory rule that, if the minor has reached the age of fourteen, the appointment can be made only on his own application.—*Everart v. Fischer*, 75 Or. 316, 147 Pac. 189. (Same case in 145 Pac. 33, modified on rehearing.) Under the statutes of New Mexico, it is the duty of the district court on appeal from a judgment of the probate court dismissing a petition to revoke the probate of a will, to appoint a guardian ad litem for an infant petitioner whose infancy is first disclosed at the trial; and a motion to dismiss the proceedings should not be sustained, notwithstanding the infant refused to apply for such appointment.—*In re Dye's Will*, 16 N. M. 297, 120 Pac. 306. Where an incompetent

has no general guardian, the court is authorized, under the statute, to appoint a guardian ad litem.—*McLarty v. Raymond* (N. D.), 172 N. W. 836. Under the statute of Nevada, the court may appoint a guardian ad litem, in any case, for an insane defendant, where it has jurisdiction of the subject-matter; such an appointment may be made for a non-resident insane defendant in a divorce suit, as a suit of that character is substantially an action in rem.—*McKibbin v. District Court*, 41 Nev. 431, 435, 171 Pac. 374.

6. Appearance for ward. Waiver of notice.—If a father appears as guardian for his minor children, without having qualified, and defends an action against them with respect to their separate property, the minors, though legally served, are not bound by the proceedings. A nunc pro tunc order appointing him their guardian before judgment rendered against them is unauthorized, and the minors would not be bound by the judgment. The court will, in its discretion, make any such order in favor of a minor not violative of the established principles of law, but the court will not indulge in any presumption against minors, where it is sought to divest them of their title to property, and they are left without lawful defense or representation, due to the failure on the part of the plaintiff's counsel and the court to see to it that they were represented. It is not for the court to say, after the trial is over, and when the judge is about to announce judgment taking from them the property left them by their mother, that the father, whom the judge was about to convict of fraud and wrong-doing, had given the minors the defense the case deserved and the real facts warranted.—*Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106, 111. In partition proceedings a ward must appear by his guardian ad litem, and not by his general guardian.—*Saville v. Saville*, 63 Kan. 861, 66 Pac. 1043, 1045. It is only when a person is a party that the court has jurisdiction to appoint a guardian ad litem.—*Boyd v. Dodson*, 66 Cal. 360, 5 Pac. 617. If the appointment is made on the day set for trial, and the guardian ad litem appears specially, objecting to proceed with the trial, on the ground that he has not had time to prepare for trial, and the case is adjourned three days by order of court, without objection, such appearance is a waiver of the statutory five-day notice of the setting of the case for trial.—*Granger v. Sheriff*, 133 Cal. 146, 65 Pac. 873. The power to appoint a *prochein ami*, like the power to appoint a guardian ad litem, is inherent in every court. In the territory of Hawaii a district magistrate may permit the next friend of an infant to bring an action for him in such court. It may be better practice to obtain a formal order admitting the next friend to prosecute, but this is not absolutely essential. It is sufficient if the court recognizes the next friend and does not dissent. The main thing is to have the leave or sanction of the court.—*Ahin v. District Magistrate*, 11 Haw. 279, 281. If the defendant in a foreclosure proceeding sets up facts indicating that a third person is the real party in interest, such third person may henceforth be considered a party so as to authorize his appearance

in the suit by a guardian ad litem as authorized by statute.—*Thronson v. Blough*, 38 N. D. 574, 166 N. W. 132.

7. **Actions.**—A guardian ad litem is a guardian within a law requiring a non-resident infant's guardian to give a bond for costs on bringing an action for the ward within the state; and the rule is controlling in actions in a federal court in the absence of a federal statute or rule of court on the subject.—*Silvas v. Arizona Copper Co. (Ariz.)*, 220 Fed. 116, 117, 136 C. C. A. 208. An infant, who has personally sold and delivered to another person his buggy, pony, and harness, and taken shares of mining stock, may disaffirm the sale and by his guardian ad litem recover the sold articles on tendering back within a reasonable time the stock, he not being required, under the statute, to make the stock good if it has lost value.—*Blake v. Harding (Utah)*, 180 Pac. 172. It is not indispensable to the prosecution of a boy of 16 under the bastardy law that there be a guardian ad litem appointed for the defendant, in a case in which the defendant has at the trial aid from his parents in all respects equivalent to what a guardian could give him.—*State v. Lyons*, 104 Kan. 702, 180 Pac. 802. If a cause of action exists in favor of a minor, the action must be prosecuted in his name, and not in that of another person, even though this person be his guardian ad litem.—*Everart v. Fischer*, 75 Or. 316, 147 Pac. 189. (Same case in 145 Pac. 33, modified on rehearing.) In an action by a guardian ad litem, it is not necessary to show that he has filed a bond, taken an oath, or received letters of guardianship; it is sufficient to show that he has filed a petition for appointment, and that the court made an order appointing him.—*Foley v. Northern California P. Co.*, 165 Cal. 103, 130 Pac. 1183. The mother of an infant defendant, as the general guardian of such defendant, a guardian ad litem having been appointed, need not be served with summons in a suit to quiet title brought by such mother against such minor.—*Fresno Estate Co. v. Fiske*, 172 Cal. 583, 597, 157 Pac. 1127. In an action by the guardian ad litem of a minor over fourteen years of age, the objection that the application for the appointment of the guardian did not show the age of the child and that the child nominated the appointee, should be raised by answer or demurrer.—*Everart v. Fischer*, 75 Or. 316, 145 Pac. 33, 147 Pac. 189. If an action is pending in the name of a minor by next friend, but during the pendency of the cause the minor attains his majority, the action does not abate, nor is the fact of having reached majority a cause for dismissal of the action.—*Johnson v. Alexander (Okla.)*, 167 Pac. 989. The action of a minor by his next friend to recover under the workmen's compensation act is not barred because the written claim for compensation was not served within the statutory time, no guardian having been appointed.—*Minturn v. Proctor & G. Mfg. Co.*, 102 Kan. 885, 172 Pac. 17.

8. **Power and liability.**—A guardian ad litem appointed by order of court in which the action is pending has, in the absence of fraud or

misrepresentation in bringing about the appointment, authority to compromise and to enter into a settlement of the cause.—*Eggers v. Krueger* (Cal.), 236 Fed. 852, 859, 150 C. C. A. 114. The guardian ad litem of an unsuccessful infant plaintiff is liable for costs, in the absence of a statute providing otherwise; but the guardian ad litem of an infant defendant is not so liable.—*Reynolds v. Great Northern R. Co.* (Wash.), 206 Fed. 1003.

9. Compensation.—The guardian ad litem of an infant in a cause carried up on appeal is entitled, regardless of how the appeal results, to be allowed compensation for his services in the higher court and to have the same taxed as costs.—*Emery v. Emery*, 104 Kan. 679, 180 Pac. 451. The attorney appointed by the probate court, as guardian ad litem for an infant party to proceedings pending in that court, is compensated for his services by a fee fixed by the court alone, a jury having no part in the matter.—*Fraser v. Davis*, 29 Ida. 70, 81, 156 Pac. 913, 158 Pac. 233.

10. Appeal. Affirmance of judgment.—Where an action was commenced in the name of a minor by her mother, designated in the title as "guardian," the judgment will be affirmed, though no appointment as guardian was alleged or proved. The mother, being the ward's natural guardian, and having assumed all the duties and liabilities, became subject to all the obligations and restraints of a next friend; and the action being for the benefit of the infant, the mother was substantially such a next friend, so far as the conduct of the case was concerned, as if she had been so described. The court will not overturn a verdict and judgment for lack of a formality in name which could have been supplied, if necessary, at any time before or after judgment.—*Abbott v. Abbott*, 68 Kan. 824, 75 Pac. 1040, 1041. Service of summons upon an infant can not be waived; no one can appear for him in defense of an action prior to such service of summons; the defense of an infant must be made by a guardian ad litem, who can not be appointed until after such service of summons; and a judgment rendered against a minor defendant without service of summons and the appointment of a guardian ad litem is void; but, where the minor defendants are not necessary parties, and the judgment is properly rendered as to all necessary parties, it will be sustained as to such parties against whom it is properly so rendered.—*Echols v. Reeburgh* (Okla.), 161 Pac. 1065.

REFERENCES.

Power to appoint guardian ad litem not impaired.—See ante, § 99. Rights, powers, and duties of guardians ad litem and next friends of infants.—See note 97 Am. St. Rep. 995-1006. Position and powers of a guardian generally.—See note *Credle v. Bangham*, 133 Am. St. Rep. 802-5.

§ 1077. Suspending power of alienation. How long it may be suspended.

Except in the single case mentioned in section seven hundred seventy-two, the absolute power of alienation can not be suspended, by any limitation or condition whatever, for a longer period than as follows:

1. During the continuance of the lives of persons in being at the creation of the limitation or condition; or

2. For a period not to exceed twenty-five years from the time of the creation of the suspension.—*Kerr's Cyc. Civ. Code*, § 715.

§ 1078. Period of lease of city lots. Property of minor or incompetent.

No lease or grant of any town or city lot for a longer period than ninety-nine years, in which shall be reserved any rent or service of any kind, shall be valid; provided, that the property of any municipality, or any minor or incompetent person, shall not be leased for a longer period than ten years, excepting that the sewer farm of a municipality and all waters and sewage used or discharged thereon may be leased for a period not exceeding twenty-five years; and excepting that the tidelands and submerged lands granted to any city by the state, or any lands belonging to such city adjacent to such tidelands and submerged lands, may be leased for a period not exceeding forty years if the grant from the state of California of the use of said tidelands and submerged lands does not provide specifically for a term of years for which said lands may be leased. Said tidelands and submerged lands and lands adjacent thereto can only be leased for industrial uses, the purpose of improvement and development of the harbor of said city, and the construction and maintenance of wharves, docks, piers or bulkhead piers or for other public uses and purposes consistent with the requirements of commerce or navigation at said harbor.—*Kerr's Cyc. Civ. Code*, § 718.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho—Compiled Statutes of 1919, section 4590.

Montana—Revised Codes of 1907, section 4463.

North Dakota—Compiled Laws of 1913, sections 6605-6607.

South Dakota*—Compiled Laws of 1913, section 2717.

§ 1078¹ Simple occupancy.

Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession; provided, however, that the title conferred by such occupancy shall not be a sufficient interest in real property to enable the occupant or his privies to commence or maintain an action to quiet title under the provisions of section seven hundred thirty-eight of the Code of Civil Procedure of this state, unless such occupancy shall have ripened into title by prescription.—*Kerr's Cyc. Civ. Code*, § 1006.

§ 1079. Tenure by which homestead is held.

From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, or from the separate property of the spouse making the selection or joining therein, the land so selected, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to the heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it, or the products, rents, issues, or profits thereof, be held liable for the debts of the owner, except as provided in this title, and should the homestead be sold by the owner, the proceeds arising from such sale to

the extent of the value allowed for a homestead exemption as provided in this title shall be exempt to the owner of the homestead for a period of six months next following such sale.—*Kerr's Cyc. Civ. Code*, § 1265.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana—Revised Codes of 1907, section 4722.

Nevada—Revised Laws of 1912, section 2145.

North Dakota—Compiled Laws of 1913, section 5627.

South Dakota—Compiled Laws of 1913, section 5778.

Washington*—Remington's 1915 Code, section 561.

Wyoming—Compiled Statutes of 1910, section 5610.

§ 1080. Qualities of expectant estates.

Future interests pass by succession, will, and transfer, in the same manner as present interests.—*Kerr's Cyc. Civ. Code*, § 699.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona—Revised Statutes of 1913, paragraph 4700.

Idaho*—Compiled Statutes of 1919, section 5333.

Montana*—Revised Codes of 1907, section 4453.

North Dakota*—Compiled Laws of 1913, section 5277.

South Dakota*—Compiled Laws of 1913, section 2707.

§ 1081. Mere possibility is not an interest.

A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind.—*Kerr's Cyc. Civ. Code*, § 700.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho*—Compiled Statutes of 1919, section 5334.

Montana*—Revised Codes of 1907, section 4454.

North Dakota*—Compiled Laws of 1913, section 5278.

South Dakota*—Compiled Laws of 1913, section 2708.

§ 1082. Contingent remainder in fee.

A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other

contingency by which the estate of such persons may be determined before they attain majority.—*Kerr's Cyc. Civ. Code*, § 772.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona*—Revised Statutes of 1913, paragraph 4681.

Idaho*—Compiled Statutes of 1919, section 5340.

Montana—Revised Codes of 1907, section 4492.

North Dakota*—Compiled Laws of 1913, section 5315.

South Dakota*—Compiled Laws of 1913, section 2745.

§ 1083. Involuntary trust resulting from fraud, mistake, etc.

One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.—*Kerr's Cyc. Civ. Code*, § 2224.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 5373.

North Dakota*—Compiled Laws of 1913, section 6280.

South Dakota*—Compiled Laws of 1913, section 3920.

§ 1084. Purchase by trustee of claims against trust fund.

A trustee can not enforce any claim against the trust property which he purchases after or in contemplation of his appointment as trustee; but he may be allowed, by any competent court, to charge to the trust property what he has in good faith paid for the claim, upon discharging the same.—*Kerr's Cyc. Civ. Code*, § 2263.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 5398.

North Dakota*—Compiled Laws of 1913, section 6304a.

South Dakota*—Compiled Laws of 1913, section 3945.

§ 1085. Investment of money by trustee.

A trustee must invest money received by him under the trust, as fast as he collects a sufficient amount, in

such manner as to afford reasonable security and interest for the same.—*Kerr's Cyc. Civ. Code*, § 2261.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 5396.

North Dakota*—Compiled Laws of 1913, section 6303.

South Dakota*—Compiled Laws of 1913, section 3943.

§ 1086. Trustee's influence not to be used for his advantage.

A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary.—*Kerr's Cyc. Civ. Code*, § 2231.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 5377.

North Dakota*—Compiled Laws of 1913, section 6284.

South Dakota*—Compiled Laws of 1913, section 3924.

§ 1087. "Will" includes codicil.

The word "will" includes codicil.—*Kerr's Cyc. Civ. Code*, § 14, subd. 5; *Kerr's Cyc. Code Civ. Proc.*, § 17, subd. 5.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 589; also section 564; as amended by Laws of 1915, chapter 4, page 4.

Colorado—Mills's Statutes of 1912, sections 7867, 8048.

Hawaii—Revised Laws of 1915, section 3269.

Montana—Revised Codes of 1907, section 6224.

North Dakota—Compiled Laws of 1913, section 5738.

Oklahoma—Revised Laws of 1910, section 8335.

Oregon—Lord's Oregon Laws, sections 7346, 7361.

South Dakota—Compiled Laws of 1913, section 3396.

Utah—Compiled Laws of 1907, section 2498.

Washington—Laws of 1917, chapter 156, page 653, section 44.

§ 1088. Effect of will upon gift.

A gift in view of death is not affected by a previous will; nor by a subsequent will, unless it expresses an intention to revoke the gift.—*Kerr's Cyc. Civ. Code*, § 1152.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 4641.

North Dakota*—Compiled Laws of 1913, section 5544.

Oklahoma—Revised Laws of 1910, section 8415.

South Dakota—Compiled Laws of 1913, section 3266.

Gifts.

1. In general.—Where money is passed from one person to another, for which a promissory note is then given by the latter as an evidence of indebtedness, and a writing is executed by the payee of the note declaring that the note shall become "null and void and not collectable" if the payee dies while it is in force, such writing is not testamentary in character; it amounts to a present executed gift to the donee of so much of the money as could not be collected in the lifetime of the payee.—*Novak v. Lovin*, 33 N. D. 424, 431, 157 N. W. 297. The facts, that a son joined with his mother in contracting to purchase land, and that the deed was made to him as grantee, do not prove, as against evidence produced to the contrary, that the intention was for him to hold beneficially; when, as facts, he furnished none of the purchase-money and he was not cherished by his mother to the exclusion of her other children; such facts did not disclose an intention to make a gift of a half interest to the son by way of advancement.—*Parks v. Parks*, 179 Cal. 472, 177 Pac. 455. Where an administrator turns in stocks as an asset of the estate, when in fact property in the same has passed by a gift inter vivos, if the stock is, by order of court, sold as such an asset, and no personal benefit is received by the administrator, the latter is answerable to the donee under the gift only in his administrative capacity.—*Grimes v. Barndollar*, 58 Colo. 421, 148 Pac. 256. Where a grandmother gave her granddaughter her home by parol gift, and later confirmed such gift by deed, the granddaughter was not liable to her grandmother's estate for rent of the home from date of the original gift to its confirmation by deed.—*Wilkin v. O'Brien* (Utah), 176 Pac. 853, 856. A married man may, although his wife be living, make such disposition as he may wish of his personal property; provided the transfer be absolute, and not a mere cover.—*Poole v. Poole*, 96 Kan. 84, Ann. Cas. 1918B, 929, 150 Pac. 592.

2. Verbal or parol gift.—A verbal gift, in order to be valid under the statute, requires, in the respect of delivery, that the donor shall, at the time of making the gift, do something which has the effect of placing in the hands of the donee the means of obtaining the control and possession of the thing given.—*Adams v. Merced Stone Co.*, 176 Cal. 415, 3 A. L. R. 928, 178 Pac. 498. A parol gift of an interest in real property is, in equity, good only in cases where valuable improvements have been made in reliance on the gift, so that to refuse to enforce the latter would be inequitable.—*Kendall v. Metroz* (Colo.), 176 Pac. 473. A "verbal" gift is not valid under section 1147 of the

Civil Code of California, unless there was an actual or symbolical delivery to the donee of the thing given, but this rule has no application where the gift was effected by an instrument in writing.—*Francœur v. Beatty*, 170 Cal. 740, 151 Pac. 123. An answer, although characterizing a testamentary instrument as a deed, and relying on it as conveying the title to the land described, is held, with accompanying averments of title by oral gift, and of the possession of lasting and valuable improvements, to have presented also the issue of passing title by an oral gift.—*Coburn v. Simpson*, 102 Kan. 234, 238, 170 Pac. 383.

REFERENCES.

Parol trust in personalty, and not a gift.—See note, ante, on Trusts.

3. **Validity of gifts.**—The elements of a valid gift are lacking in a case where the alleged donor has, through false reports as to the necessities of the alleged donee, been deluded into having a certificate of stock issued in the latter's name, retaining the same, however, in his own keeping, with the understanding that at his death the face owner is to have both title and possession, and has then outlived the face owner.—*Schutzer v. Taylor* (Cal. App.), 180 Pac. 660. If woman deposits money in a bank to the joint account of herself and niece, a valid gift to the niece arises therefrom.—*Kelly v. Woolsey*, 177 Cal. 325, 170 Pac. 837. If a person claims to be entitled to an entire estate, this does not estop him to make subsequently a claim to a part; applied to a contention for the ownership of corporate stock in mining companies, which stock was claimed as a gift *inter vivos*; such a gift of that kind of stock is valid without any indorsement of the certificates.—*Grimes v. Barndollar*, 58 Colo. 421, 439, 148 Pac. 256. Delivery is essential to the validity of a gift, whether it be a gift *inter vivos* or a gift *causa mortis*; without legal delivery, the title does not pass.—*O'Gorman v. Jolley*, 34 S. D. 26, 33, 147 N. W. 78. A gift of the donor's own promissory note, either *inter vivos* or *causa mortis*, does not create an enforceable obligation in favor of the donee against the donor or his estate; there is no consideration; the gift is not executed until the note is paid.—*Wisler v. Tomb*, 169 Cal. 382, 146 Pac. 876. Under the facts and circumstances of this case it is held that a gift of the bulk of his estate, made during his last illness, leaving only about \$10,000, and debts aggregating \$234,000, was ample to support a finding that the gift was made with the intent and purpose of defrauding creditors, within the meaning of section 3439, Civil Code, and therefore void.—*Adams v. Prather*, 176 Cal. 33, 167 Pac. 534, 538.

4. **To be delivered after death.**—A decedent left a lot of securities wrapped in a brown paper parcel, the same being marked: "In case of my death to be opened only by Robert Bragg, Sr., or Rebecca Bragg Martenstein." Held, that "only" referred, not to the time of opening, but to the persons who might open, the package.—*Bragg v. Martenstein*, 25 Cal. App. 199, 143 Pac. 79. Where securities are left in a package marked: "In case of my death to be opened only by

Robert Bragg, Sr., or Rebecca Bragg Martenstein," the marking indicates nothing as to what is to be done with the securities after the package shall have been opened.—*Bragg v. Martenstein*, 25 Cal. App. 199, 143 Pac. 79. Where securities are inclosed in several envelopes, each envelope bearing the name of some relative of the owner, and all these are tied up in a brown paper parcel marked: "In case of my death to be opened only by Robert Bragg, Sr., or Rebecca Bragg Martenstein," the indication is that the writer of the inscription did not intend thereby to change any previous direction given respecting the delivery of the envelopes inclosed in the parcel.—*Bragg v. Martenstein*, 25 Cal. App. 199, 143 Pac. 79. A woman who, while sick, but not dangerously sick or so deeming herself, indorses a certificate of stock and delivers it to another person with instructions to transfer it to a third person immediately on her death, thereby rests a present title to the stock in such third person subject to a life interest in herself.—*Coward v. De Cray*, 38 Cal. App. 290, 176 Pac. 56. If a father execute and deliver to his only child and sole dependent, an absolute deed of real estate, the same then being withheld from record until after his death, which does not take place until eight years have elapsed, the transfer may be valid, even though after the delivery he improve the property and pay the taxes regularly out of his own funds.—*Woolley v. Taylor*, 45 Utah 227, 144 Pac. 1094. It is a cardinal rule of construction that no part of a writing, or of several contemporaneous writings, is to receive an interpretation which would render it or them unlawful, inoperative, indefinite, unreasonable, or incapable of being carried into effect.—*Bragg v. Martenstein*, 25 Cal. App. 199, 143 Pac. 79. Where securities were inclosed in envelopes, each bearing the name of some relative of the owner, and these were put in a package bearing the inscription: "In case of my death to be opened only by Robert Bragg, Sr., or Rebecca Bragg Martenstein," and it appears that the writings on the outside of the wrapper and those on and within its inclosures were made contemporaneously and as part of the same transaction, they are to be construed together.—*Bragg v. Martenstein*, 25 Cal. App. 199, 143 Pac. 79. If, on a person's death, there are found securities inclosed in envelopes, each of which is marked with the name of a relative of the deceased, wrapped together in a brown paper parcel bearing the inscription: "In case of my death to be opened only by," etc., it is the court's legal duty to place such an interpretation upon this inscription as will not only give a reasonable effect to what the writer intended by it, but in so doing will render effectual and valid the intention and purpose of the writer as expressed in the inclosures of the parcel. To arrive at this, it should examine the facts and circumstances.—*Bragg v. Martenstein*, 25 Cal. App. 199, 143 Pac. 79.

5. Evidence.—One asserting title by gift must prove it by evidence that is clear and convincing, strong and satisfactory.—*Plath v. Mullins*, 87 Wash. 403, 151 Pac. 811. Where a claim of gift is asserted after the death of the donor, every element necessary to constitute a gift must

be sustained by explicit and convincing evidence, and the burden of proof is on the donee.—*Sullivan v. Shea*, 32 Cal. App. 369, 162 Pac. 925.

6. Repudiation, revocation, or setting aside.—A deed by a man to a woman, made in contemplation of marriage, may be, if duly executed and recorded, a completed gift of the property, and not subject to repudiation by the grantor if the marriage is not consummated.—*Anderson v. Hall*, 91 Wash. 376, 157 Pac. 996. A woman who, while affected with an acute illness not such as to cause apprehensions of death and while showing, neither by word nor act, any sign that she has any such apprehensions, indorses a certificate of stock and delivers it to another person with instructions to transfer it to a third immediately on her death, can not afterwards revoke the transaction as being a gift *causa mortis*.—*Coward v. De Cray*, 38 Cal. App. 290, 176 Pac. 56. If a married man has made a transfer of personalty, with the evident intention of still having control of it afterwards, his widow may have the transfer set aside.—*Poole v. Poole*, 96 Kan. 84, Ann. Cas. 1918B, 929, 150 Pac. 592.

REFERENCES.

What constitutes testamentary gift to a class.—See note 21 Am. & Eng. Ann. Cas. 415.

7. Validity of gifts *inter vivos*.—To constitute a valid gift *inter vivos* there must be an intention to give, and there must be a delivery to the donee, or to some one for him, of the property given.—*Sullivan v. Shea*, 32 Cal. App. 369, 162 Pac. 925. It is not indispensable to a gift *inter vivos* that the delivery be to the donee in person.—*Woolley v. Taylor*, 45 Utah 227, 144 Pac. 1094. A gift *inter vivos* of personal property may be validly made although with a postponement of present enjoyment; provided the donor make unconditional delivery and parts with all future control and dominion.—*Woolley v. Taylor*, 45 Utah 227, 144 Pac. 1094. The indorsement of the certificates by the donor is not indispensable to the validity of a gift *inter vivos* of shares of stock in a corporation.—*Grimes v. Barndollar*, 58 Colo. 421, 148 Pac. 256. Where a woman has a daughter and three sons, the daughter being away from home by reason of her brothers' inimical conduct toward her and kept ignorant of her mother's condition, and her letters to her mother being withheld from the latter; if this woman gives to her sons all she owns, real and personal, the fact that this is done during her last illness is worthy of note, when the question of undue influence is under consideration; but the facts as a whole make the question a proper one for the jury.—*Coblentz v. Putifer*, 97 Kan. 679, 156 Pac. 700. The elements necessary to the validity of a gift *inter vivos* have been specifically stated as follows: 1. The donor must be competent to contract. 2. There must be freedom of will. 3. The gift must be complete, with nothing left undone. 4. The property must be delivered by the donor and accepted by the donee. 5. The gift must go into immediate and absolute effect.—*Fisher v. Ludwig*, 6 Cal. App. 144, 91 Pac. 658, 660. Where the donor gives to the donee

the means whereby he may reduce the property to his possession, as for example, where he gives an order upon a bank where money of the donor is deposited, such gift is valid, *inter vivos*, even though the bank did not actually transfer the money to the account of the donee until the day after the death of the donor.—*Fisher v. Ludwig*, 6 Cal. App. 144, 91 Pac. 658, 660. No good reason exists why a difference should be made between a "transfer" *inter vivos* and a "devise" of land, in the matter of the creation of easements; hence if a landowner apports quasi easements to various tracts, of those forming his estate, these ripen into easements in favor of, or burdens upon, such tracts when he shall have disposed of the same by will.—*Cheda v. Bodkin*, 173 Cal. 7, 158 Pac. 1025.

8. *Gift inter vivos, when complete.*—If a gift *inter vivos* is perfected by the delivery of possession of the thing, or the delivery of a deed of gift, it is complete, although it was made without any consideration.—*Burkett v. Doty*, 32 Cal. App. 337, 162 Pac. 1042. A gift *inter vivos* is not complete until delivery of the subject-matter to the donee, and until that is effected the donor has continuous right of revocation if the conditions on which it is based are not complied with.—*Simer v. Flatt (Okla.)*, 177 Pac. 545. A "gift *inter vivos*" of real and personal property is complete when there is an intention to give, accompanied by a delivery of the thing given, and an acceptance by the donee.—*Manning v. Maytubby*, 42 Okla. 414, 141 Pac. 781.

9. *Evidence as to gifts inter vivos.*—The donee of a gift *inter vivos* has the burden of proving that there was no undue influence exerted upon the donor, in case he bore a confidential relation to him.—*Coblentz v. Putifer*, 97 Kan. 679, 156 Pac. 700. Money which a woman deposits in a bank to the credit of herself, "or" her daughter, the two signing and leaving with the depository at the same time a writing to the effect that such money and all sums thereafter so deposited shall be payable on demand of either, is a good gift *inter vivos*, if the daughter testifies that the mother told her the money was so deposited so that the witness should have it on the other's death, and this testimony can be satisfactorily corroborated.—*Bell v. Moloney*, 175 Cal. 366, 165 Pac. 917. In a case involving a gift *inter vivos* based on an alleged consideration of love and affection, the donee being the daughter, and having the control and direction, of the donor, an aged woman, a strong presumption of confidential relation arises, which would place upon the beneficiary in the transaction the burden of showing fairness in dealing and full understanding on the part of the person parting with the property.—*Campbell v. Genshlea (Cal.)*, 180 Pac. 336. If a person says "I have given all my stocks to" another person whom he names and also says, referring to this person "the stocks are hers," evidence of these declarations as, after the death of the speaker, admissible to show that the person named was the donee of a gift *inter vivos*.—*Grimes v. Barndollar*, 58 Colo. 421, 148 Pac. 256. If a mother deposits money in a bank and has the pass

book made out "Payable to — or —, an equal amount to each," specifying two children of hers, into the hands of one of whom she places the pass book, this is a valid gift *inter vivos*, even though after her death the book is found in her apartment; provided there is evidence to prove that it was her intention to make the gift.—*Boyle v. Dinsdale*, 45 Utah 112, Ann. Cas. 1917E, 363, 143 Pac. 136. A gift obtained by any person standing in a confidential relation to the donor is *prima facie* void and the burden is thrown upon the donee to establish to the satisfaction of the court that it was the free, voluntary, unbiased act of the donor. A court of equity watches said transactions with a jealous scrutiny, and to set them aside it is not necessary to prove actual fraud, or that there was such a degree of infirmity or imbecility of mind in the donor as amounts to legal incapacity to make a will.—*Jenkins v. Jenkins*, 66 Or. 12, 132 Pac. 542, 543.

10. *Gifts causa mortis*. Elements, nature of, conditions, and how determined.—An essential element to a gift *causa mortis* is that the donor make the delivery in expectation of death.—*Funnell v. Conrad* (Okla.), 176 Pac. 904. A gift *causa mortis* is a gift in contemplation of approaching death, the intent being accompanied by delivery, and both by conditions which the law imposes, any one of which may operate as a defeasance; first, if the danger of death pass without death of the donor; second, if the donor revokes the gift before his death; and third, if the donee die before the donor.—*O'Gorman v. Jolley*, 34 S. D. 26, 34, 147 N. W. 78. A gift *causa mortis* is subject to the conditions: (1) It must be made in contemplation, fear, or peril of death. (2) The donor must die of the illness or peril which he then fears or contemplates. (3) The delivery must be made with the intent that title shall vest only in case of death.—*O'Neil v. O'Neil* (First Nat. Bank), 43 Mont. 505, Ann. Cas. 1912C, 268, 117 Pac. 889, 890. The validity of such a gift is determined by the law of the place where it is made, without reference to the domicile of the donor.—*Hillman v. Young*, 64 Or. 73, 129 Pac. 124. Gifts *causa mortis* can not be consummated by mere parol. There can be no such gift without an intention to give and a delivery either actual or constructive, of the thing given. The donor must part with all dominion over the property, so that no further act is required of him or his personal representative, to vest the title perfectly in the donee, if it be not reclaimed by the donor during his life. If the possession of the donee does not continue, the gift is at an end. He must take and retain possession until the donor's death.—*Hamlin v. Hamlin*, 59 Wash. 182, 109 Pac. 365. In a case where, while living, the deceased had the legal right and power of disposition, as to specific securities, the question whether he made a valid gift of these, *causa mortis*, is to be determined by the intention and character of the transaction and the delivery of the property; and neither the one nor the other may be established by the

circumstances of the donee's possession.—*Newsome v. Allen*, 86 Wash. 678, 151 Pac. 111.

11. **Same. Evidence.**—It is provided in section 1150 of the Civil Code that "a gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death is presumed to be a gift in view of death."—*Mellor v. Bank of Willows*, 173 Cal. 454, 160 Pac. 567. A man subject to sudden attacks from a kidney affection, and who had been warned by his physician that he would "quit on the sidewalk" and do so "within two years" and that he had better fix up his business, had repeatedly told his wife that if ever he "should get a rough one" he wouldn't live. He was brought home in great agony one Saturday morning and said to his wife, "It is a rough one." When in course of being undressed and put to bed, he gave her a purse containing \$150 in cash and three certificates of deposit, and he repeated, "It is a rough one, Dora." After getting into bed he turned over on his side and said, "Dora, the taxes are due on Monday. See that they do not become delinquent if I do not wake." He died the same day. It was held that, regardless of the presumption mentioned in section 1150 of the Civil Code, the evidence here was amply sufficient to support the finding that the decedent acted in contemplation of death.—*Mellor v. Bank of Willows*, 173 Cal. 454, 160 Pac. 567. When no one was present other than the donor and donee at the time of a transaction claimed by the latter, after the former's death, to be a gift *causa mortis*, the testimony of the claimant should be viewed with caution, and even with suspicion, in order to prevent fraud. However on appeal, in a case where the trial court has found in favor of such testimony, it can not be assumed that in making its finding the court ignored the rule.—*Mellor v. Bank of Willows*, 173 Cal. 454, 160 Pac. 567. Where, by reason of some such fact as extreme illness, the donor lacks opportunity to make an indorsement or written assignment of an instrument, such as a certificate of deposit, intended as a gift *causa mortis*, the absence of an indorsement does not raise a presumption against the validity of the transfer. And see *Edwards v. Wagner*, 121 Cal. 376, 53 Pac. 821.—*Mellor v. Bank of Willows*, 173 Cal. 454, 160 Pac. 567. A gift *causa mortis* need not be effected by the donor's using words such as "These are yours" or "I give these to you," or "Take these for yourself"; the intention to give is a question of fact, to be determined, like other questions of fact, from all the evidence considering the situation of the parties, their relationship, the circumstances surrounding the transaction, the apparent purpose in making the gift, the words spoken at the time, and the like.—*Mellor v. Bank of Willows*, 173 Cal. 454, 160 Pac. 567.

12. **Gifts causa mortis distinguished.**—A gift *causa mortis* is operative to transfer the title and vest it in the donee at once. The essential difference between a gift *inter vivos* and a *donatio causa mortis* is that the former must take effect during the life of the

donor absolutely, completely, and irrevocably; while the latter, though a present transfer of title, is incomplete, and subject to be divested by the happening of any one of the conditions, namely, revocation by the donor, his survival of the apprehended peril, or the want of sufficient evidence to discharge his debts and liabilities, in which last-mentioned case it would be fraudulent as to creditors.—*Deneff v. Helms*, 42 Or. 164, 70 Pac. 390, 391. In a gift causa mortis a written instrument is not necessary. The most characteristic mark of distinction between a legacy and such a gift is the change of possession.—*Noble v. Garden*, 146 Cal. 225, 2 Ann. Cas. 1001, 79 Pac. 883; *Fite v. Perry*, 8 Cal. App. 85, 96 Pac. 102, 103. Where the donee testifies that it was not intended to transfer possession until the death of the donor, a finding, in effect, that the gift was a gift causa mortis, will not be sustained.—*Fite v. Perry*, 8 Cal. App. 85, 96 Pac. 102, 104. A gift causa mortis is not contrary to public policy and will be upheld, when established.—*Deneff v. Helms*, 42 Or. 164, 70 Pac. 390, 393. Provisions relating to gifts causa mortis.—See *Noble v. Garden*, 146 Cal. 225, 2 Ann. Cas. 1001, 79 Pac. 883, 885; legacy or gift in contemplation, fear, or peril of death.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1367. An allegation in a complaint seeking to set up that a gift was causa mortis is bad unless it avers that the gift was made in contemplation of death.—*Hillman v. Young*, 64 Or. 73, 129 Pac. 124.

13. What is a valid gift causa mortis.—The placing of jewels in the hands of a trust company by one owning them and anticipating death, with instructions in writing to deliver them to a specified absent person, is a valid gift causa mortis.—*Brind v. International Trust Co. (Colo.)*, 179 Pac. 148. Where a person, during his last illness, transfers the bulk of his estate, leaving only \$10,000, and debts aggregating \$234,000, such transfer will be deemed a gift in view of death, within the meaning of section 1150, Civil Code, and a legacy, within the meaning of section 1153, Civil Code, and liable for the debts and obligations of the deceased.—*Adams v. Prather*, 176 Cal. 33, 167 Pac. 534, 537. Under such circumstances as the assigning by a woman of \$25 from her savings bank account to a son, a like assignment to a daughter, and an assignment of the balance to a second daughter, and subsequently, while knowing herself to be on her death-bed, calling the latter to her and saying "all that box contains is yours," her treasure box being then drawn from under the bed and pushed back again and the key being delivered to a bystander with directions to give it to this daughter, the latter remaining then in the room until the death and being given the key thereafter, this daughter is the recipient of a valid gift causa mortis, the box containing the savings bank deposit books.—*Allen v. Smith*, 38 Cal. App. 409, 176 Pac. 365. The words: "I give you my automobile, May," addressed by a person shortly before his death to the donee, constitute, as an administrator, a valid gift causa mortis, where the intent was obvious; where there was no fraud or undue influence; and where the donee accepted and

took charge of the machine for several days, when the administrator got hold of it. The law favors the disposition of property by the owner before death.—*MacKenzie v. Steeves*, 98 Wash. 17, 19, 167 Pac. 50.

14. What is not a gift causa mortis.—It is not sufficient to constitute a gift causa mortis, where the owner of securities, in a box in a safety-deposit vault, says to the custodian, "I am going to the hospital to submit to an operation and, in case I don't come back, the contents are to be delivered to" persons then and there present and indicated.—*Newsome v. Allen*, 86 Wash. 676, 151 Pac. 111. A bill of sale of personal property made by a person over 71 years of age, feeble, and suffering from the illness from which he died, and averse to having his estate administered by the probate court to his nephew to compensate him for caring for him and his property for two years, was not a gift causa mortis, but a transfer for a valuable consideration.—*Ellis v. Funk*, 32 Cal. App. 426, 428, 163 Pac. 332. The placing of jewels by the owner in the hands of a trust company along with a written communication to the effect that she proposes to submit to a surgical operation and, in case she does not survive it, desires the jewels to be delivered to a person named, is no valid action in case the donor then undergoes the operation safely and subsequently dies from the malady which the operation was hoped to cure.—*Brind v. International Trust Co. (Colo.)*, 179 Pac. 148.

§ 1089. Summons, how served.

The summons must be served by delivering a copy thereof as follows:

3. If the suit is against a minor, under the age of fourteen years, residing within this state: to such minor, personally, and also to his father, mother, or guardian; or if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

4. If the suit is against a person residing within this state who has been judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed: to such person, and also to his guardian.—*Kerr's Cyc. Code Civ. Proc.*, § 411.

§ 1089.¹ Service by mail, how made.

In case of service by mail, the notice or other paper must be deposited in the post-office, in a sealed envelope,

addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid.

The service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day for every twenty-five miles distance between the place of deposit and the place of address; such extension, however, not to exceed thirty days in all.—*Kerr's Cyc. Code Civ. Proc.*, § 1013.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 1330.

Arizona—Revised Statutes of 1913, paragraph 493.

Idaho*—Compiled Statutes of 1919, section 7201.

Montana—Revised Codes of 1907, sections 7147, 7148.

Nevada—Revised Laws of 1912, section 5373.

North Dakota—Compiled Laws of 1913, sections 7952-7954.

Oregon—Lord's Oregon Laws, section 541.

South Dakota—Compiled Laws of 1913, sections 554, 556.

Utah—Compiled Laws of 1907, section 3333.

Washington—Remington's 1915 Code, section 247.

§ 1090. What is evidence of publication.

Evidence of the publication of a document or notice required by law, or by an order of a court or judge, to be published in a newspaper, may be given by the affidavit of the printer of the newspaper, or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when, and the paper in which, the publication was made.—*Kerr's Cyc. Code Civ. Proc.*, § 2010.

§ 1091. Powers of superior judges at chambers.

The judge or judges of a superior court, or any of them, may, at chambers, grant all orders and writs which are usually granted in the first instance upon an ex parte application, and may, at chambers, hear and dispose of such orders and writs; and may also, at chambers, ap-

point appraisers, receive inventories and accounts to be filed, suspend the powers of executors, administrators, or guardians in the cases allowed by law, grant special letters of administration or guardianship, approve claims and bonds, and direct the issuance from the court of all writs and processes necessary in the exercise of their powers in matters of probate.—*See Kerr's Cyc. Code Civ. Proc.*, § 166.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 1542.

Arizona—Revised Statutes of 1913, paragraph 344.

§ 1092. Presumption as to survivorship.

When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to the following rules:

1. If both of those who have perished were under the age of fifteen years, the older is presumed to have survived;
2. If both were above the age of sixty, the younger is presumed to have survived;
3. If one be under fifteen and the other above sixty, the former is presumed to have survived;
4. If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived; if the sexes be the same, then the older;
5. If one be under fifteen, or over sixty, and the other between those ages, the latter is presumed to have survived.—*Kerr's Cyc. Code Civ. Proc.*, § 1963, subd. 40.

Note.—The earthquake of April 18, 1906, at Santa Rosa, Sonoma County, California, was a "calamity" within the meaning of section 1963, subd. 40, of the Code of Civil Procedure of that state; and where a husband and his wife both perished in that calamity, and they were both over fifteen and under sixty years of age, and it is not shown by any direct evidence who died first, the husband is presumed to have

survived, in the absence of any particular circumstances from which it can be inferred who died first.—Grand Lodge, etc., A. O. U. W., United Workmen v. Miller (Cal.), 96 Pac. 22.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana*—Revised Codes of 1907, section 7962, subd. 40.

North Dakota*—Compiled Laws of 1913, section 7935, subd. 40.

Oregon*—Lord's Oregon Laws, section 799, subd. 41.

§ 1093. Persons who can not testify.

The following persons can not be witnesses:

3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person.—*Kerr's Cyc. Code Civ. Proc.*, § 1880, subd. 3.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona—Revised Statutes of 1913, paragraph 1678.

Colorado—Mills's Statutes of 1912, section 8007.

Idaho*—Compiled Statutes of 1919, section 7936.

Kansas—General Statutes of 1915, section 7222.

Montana—Revised Codes of 1907, section 7891; as amended by Laws of 1913, chapter 41, page 57.

Nevada—Revised Laws of 1912, section 5419.

New Mexico—Statutes of 1915, section 2175.

North Dakota—Compiled Laws of 1913, section 7871.

Oklahoma—Revised Laws of 1910, section 5049.

Oregon—Lord's Oregon Laws, section 732.

South Dakota—Compiled Laws of 1913, section 5260.

Utah—Compiled Laws of 1907, section 3413.

§ 1094. Form. Acknowledgment by corporation.

The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form:¹

State of —, }
County ² of —, }ss.

On this — day of —, in the year —, before me,³
personally appeared —, known to me ⁴ to be the presi-

dent⁵ of the corporation that executed the within instrument,⁶ and acknowledged to me that such corporation executed the same.

Explanatory notes.—1 See Kerr's Cyc. Civ. Code, § 1190. 2 Or, City and County. 3 Here insert the name and quality of the officer. 4 Or, proved to me on the oath of —. 5 Or, the secretary. 6 Where, however, the instrument is executed on behalf of the corporation by some one other than the president or secretary, insert, after the blank following "appeared," the words: "known to me, or proved to me on the oath of —, to be the person who executed the within instrument on behalf of the corporation therein named."

§ 1095. Form. Affidavit of posting notice.

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.
[Title of form.]

State of —, }
County² of —, } ss.

—, being duly sworn, says:

That he is, and at all times hereinafter named was, a deputy county clerk of said county, a male citizen of the United States, of the age of twenty-one years and upwards, not interested in the estate of — deceased; that he is competent to be a witness in the matter of said estate; and that on the — day of —, 19—, he posted correct and true copies of the annexed notice in three of the most public places in said county, to wit: one of said copies at the place at which the court is held,³ one at —,⁴ and one at —.⁵

Subscribed and sworn to before me this — day of —, 19—.

—, County Clerk.⁶

Explanatory notes.—1 Give file number. 2 Or, City and County. 3 Name the place. 4, 5 As, city hall, land-office, sheriff's office, United States post-office in —, etc. 6 Or other officer taking the oath.

§ 1096. Form. Appointment of special commissioner to take depositions.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

The People of the State of —.

To —.

Know ye, That, trusting to your fidelity and circumspection, we have appointed you special commissioner, and do hereby authorize you to administer the necessary oaths, and take the depositions of — and —, residing at —, county of —, state of —, or either of them, in answer to the interrogatories direct, annexed hereto in the matter of the estate of —, deceased.

All of which matter, together with this writ, you will return to this court according to law, in a sealed envelope, directed to the clerk of said —² court, at —,³ state of —, and forward the same by mail or express, or other usual channel of conveyance.

Witness, the Honorable —, presiding judge of the —⁴ court, county of —, state of —, this — day of —, 19—.

Attest my hand and the seal of said court, the day and year last above written.

[Seal] —, County Clerk of the County of —, State of —, and ex-officio Clerk of the —⁵ Court thereof.

By —, Deputy County Clerk and ex-officio Deputy Clerk of the —⁶ Court.

Explanatory notes.—1 Give file number. 2 Title of court. 3 Name the place. 4-6 Title of court.

§ 1097. Form. Subpoena.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

The People of the State of — send Greeting to — and —:

We command you, That, all and singular business and

excuses being set aside, you appear and attend before our said —² court of the county of —, state of —, at a session of said court, to be held in the court-room of said court,³ in the said county of —, on the — day of —, 19—, at — o'clock in the forenoon⁴ of said day, then and there to testify in the above-stated matter, now pending in said —⁵ court; and for a failure to attend you will be deemed guilty of contempt of court and liable to pay all losses and damages sustained thereby to the parties aggrieved, and forfeit — dollars (\$—), in addition thereto.

By order of the —⁶ court, of said county⁷ of —, this — day of —, 19—.

Attest my hand and the seal of said court the day and year last above written. —, Clerk.

[Seal]

By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2 Title of court. 3 State location of court-room. 4 Or, afternoon. 5, 6 Title of court. 7 Or, city and county.

§ 1098. Form. Summons. (Trustee as plaintiff.)

[Title of court.]

[Title of cause.]¹

{ No. —. ² Dept. No. —.
[Title of form.]

The People of the State of —, to all persons claiming any interest in or lien upon the real property herein described, or any part thereof, defendants, Greeting:

You are hereby required, To appear and answer the complaint of the —,³ as trustee of the trusts created by the decree of partial distribution in the matter of the estate of —, deceased, plaintiff, filed with the clerk of the above-entitled court and county,⁴ within three months after the first publication of this summons, and to set forth what interest or lien, if any you have, in or upon that certain real property, or any part thereof, situated in the county⁵ of —, state of —, and particularly described as follows: —.⁶

And you are hereby notified, That, unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in the complaint, to wit, a judgment and decree of this court establishing the title of said plaintiff to said real property and determining all estates, rights, titles, interests, and claims therein and thereto, and declaring plaintiff to be the owner in fee simple of the said real property, free and clear of any and all liens and encumbrances whatsoever.

Witness my hand and the seal of said court this — day of —, 19—. —, Clerk.

[Seal]

By —, Deputy Clerk.

Memorandum.

The first publication of this summons was made on the — day of —, 19—, in the —, a newspaper printed in said county⁷ and state.

Dated this — day of —, 19—.

— and —, Attorneys for Plaintiff.

Explanatory notes.—1 Give file number. 2 As, Union Trust Company of San Francisco, as Trustee of the Trusts Created by the Decree of Partial Distribution in the Matter of the Estate of —, Deceased, Plaintiff, v. All Persons Claiming Any Interest in or Lien upon the Real Property Herein Described, or Any Part Thereof, Defendants. 3 As, Union Trust Company, etc. 4, 5 Or, city or county. 6 Describe the land. 7 Or, city and county.

§ 1099. Form. Summons. (Executor as plaintiff.)

[Title of court.]

[Title of cause.]¹

{ No. —.² Dept. No. —.
[Title of form.]

The People of the State of —, to all persons claiming any interest in, or lien upon the real property herein described, or any part thereof, Greeting:

You are hereby required, To appear and answer the complaint of —, as executor of the will of —, deceased, filed with the clerk of the above-entitled court, within three months after the first publication of this summons, and to set forth what interest or lien, if any

you have, in or upon that certain real property, or any part thereof, situated in the county ³ of —, state of —, and particularly described as follows, to wit: —.⁴

You are hereby notified, That, unless you so appear and answer the complaint, plaintiff will apply to the court for relief demanded in the complaint, to wit, that it be adjudged that —, at the time of her death was the owner of said property in fee simple absolute and that her title to said property be established and quieted; that the court ascertain and determine all estates, rights, titles, interests, and claims in and to said property and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, and whether the same consists of mortgages or liens of any description; that plaintiff recover his costs herein, and for such other and further relief as may be meet in the premises.

Witness my hand and the seal of said court this — day of —, 19—. . —, Clerk.

[Seal]

By —, Deputy Clerk.

Memorandum.

The first publication of this summons was made on the — day of —, 19—, in the —, a newspaper published in said county ⁵ and state.

Memorandum.

The following named persons claim an interest in the foregoing described property adverse to plaintiff:

Names.

Address.

—

—

—

—

—, Attorney for Plaintiff.

Explanatory notes.—1 Give file number. 2 As, John Doe, as Executor of the Last Will and Testament of Mary Stiles, Deceased, Plaintiff, v. All Persons Claiming Any Interest in or Lien upon the Real Property herein Described, or Any Part thereof, Defendants. 3 Or, city and county. 4 Describe the land. 5 Or, city and county.

§ 1100. Form. Order of reference to court commissioner to examine and report on qualifications of sureties.

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.
[Title of form.]

It is hereby ordered, That —, court commissioner of the county of —, state of —, examine into the qualifications of the sureties — and —, on the bond or undertaking of —, the administrator ² of the estate of —, deceased, which said sureties are offered in the above-entitled cause, and to which exceptions have been taken by —; and that said —, take such action in the matter as is authorized by law, and report the same to this court with all convenient dispatch.

—, Judge of the —³ Court.

Explanatory notes.—1 Title of court. 2 Or, executor. 3 Title of court.

§ 1101. Form. Description of property. (In general.)

That certain lot of land lying and being in the city and county of San Francisco, state of California, commencing at a point on the westerly line of Drumm street, distant thereon ninety-one (91) feet and eight (8) inches southerly from the southerly line of Sacramento street; thence southerly and along said westerly line of Drumm street forty-five (45) feet and ten (10) inches; thence at a right angle westerly one hundred and thirty-seven (137) feet and six (6) inches; thence at a right angle northerly forty-five (45) feet and ten (10) inches; thence at a right angle easterly one hundred and thirty-seven (137) feet and six (6) inches to the westerly line of Drumm street and the point of commencement, being Beach and Water Lot, No. 536.

§ 1102. Form. Brief description of parcels.

The following is a brief description of the several parcels of said real estate, all situate in said city and county of San Francisco, state of California,—

1. Lot situate at the southwest corner of Sacramento and Leidesdorff streets, being fifty-five (55) feet and three (3) inches on southerly line of Sacramento street by one hundred and twenty-two (122) feet six (6) inches on Leidesdorff street.

2. Lot at southeast corner of Front and Sacramento streets forty-five (45) feet ten (10) inches by seventy-seven (77) feet six (6) inches.

3. Lot on southerly line of Sacramento street distant thereon seventy-eight (78) feet six (6) inches east of the east line of Montgomery street; thence east twenty (20) feet by forty-five (45) feet ten (10) inches southerly.

4. Lot at southwest corner of Washington and Montgomery streets, being thirty-seven (37) feet six (6) inches on Washington street by forty-six (46) feet on Montgomery street.

5. Lot on the easterly line of Stockton street distant thereon twenty-eight (28) feet six (6) inches southerly from the southerly line of Jackson street; thence southerly on said line of Stockton street twenty-one (21) feet by seventy-eight (78) feet.

6. Lot at the southeast corner of Jackson and Stone streets, being twenty-eight (28) feet on Jackson street by forty-two (42) feet six (6) inches on Stone street.

§ 1103. Form. Description by course and distance.

Commencing at an angle point in the northwesterly line of Cliff Avenue formed by the two courses (A) N. 25° 15' E., 170 feet more or less, and (B) N. 78° 30' E., 180 feet more or less, which angle point is marked by an iron monument; running thence alone Cliff Avenue S. 25° 15' W., 170 feet more or less to an angle point, which angle point is marked by an iron monument, said point being the most southerly corner of the building known as the Cliff-House stable; thence S. 25° 15' E., 350 feet more or less to an angle point, which angle point is

marked by an iron monument; thence leaving Cliff Avenue S. 64° 45' W., 40 feet more or less to high water mark of the Pacific Ocean; thence following the meanderings of said high water mark, in a northerly direction to a point which bears N. 64° 45' W., from the point of commencement, being the premises which include the Cliff House, a portion of the Cliff-House stable, and also certain other lands to the south of the Cliff House.

§ 1104. Form. Order requiring notice of application for restoration of records, and of the setting of said application for hearing.

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.
[Title of form.]

On reading and filing the verified application of —, the administrator ² of the estate of —, deceased, praying for an order restoring the records, processes, orders, papers, and files in said cause,—

It is ordered, That said application be heard before me, in said court, at its court-room ³ in said county ⁴ of —, state of —, on the — day of —, 19—, at — o'clock in the forenoon ⁵ of said day, or as soon thereafter as counsel can be heard, and that a copy of this notice be published in —, a newspaper of general circulation, printed and published in said county ⁶ of —, daily for at least ten days, with the last day of publication at least five days before said hearing; and let service otherwise be made on all persons known to be interested in said matter, not parties hereto, as provided by law.

Done in open court this — day of —, 19—.

—, Judge of said — Court.

Explanatory notes.—¹ Give file number. ² Or (of the — Company of —, executor of the will, and codicil thereto, of —, deceased; or, of — executor or executrix of the will of —, deceased), and of —, —, —, and —, children, next of kin, and sole heirs at law of said deceased, and like residuary legatees under his said will in the above-entitled matter; or as the case may be. ³ Give

number of department, and location of court-room. 4 Or, city and county. 5 Or, afternoon. 6 Or, City and County.

§ 1105. Form. Notice of application to restore destroyed records, by order of court, and of time and place fixed for hearing. (Case of entire destruction.)

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

Notice is hereby given, That —, the surviving executor ² of the will of —, deceased, has filed a written application, verified by affidavit, in the above-entitled proceeding, pending in and belonging to said court, showing that the original of the judgments, decrees, orders, documents, records, papers, processes, and files heretofore made, entered, or filed in the above-entitled matter, and the whole thereof, were and each of them was, entirely lost, injured, and destroyed by reason of a conflagration on the — day of —, 19—; that said loss, injury, and destruction occurred without his fault or neglect; that he can not obtain certified copies thereof, or either of them, and that said loss, injury, and destruction, unless supplied or remedied, will or may result in damage to him, and praying for an order of said court reciting what was the substance and effect of said lost, injured, or destroyed judgments, decrees, orders, documents, records, papers, processes, and files.

And notice is further given, That —,³ the — day of —, 19—, at — o'clock in the forenoon ⁴ of said day, and the court-room of said — court,⁵ in said county ⁶ of —, state of —, have been fixed by the said court, as the time and place for the hearing of said application.

The application aforesaid is here and hereby specially referred to for all particulars thereby shown.

Dated —, 19—.

—, Clerk.

[Seal]

By —, Deputy Clerk.

—, Attorney for Petitioner.⁷

Explanatory notes.—1 Give file number. 2 Or, — a corporation, as guardian of the estate of —, a minor; or as the case may be. 3 Day of week. 4 Or, afternoon. 5 Give location of court-room. 6 Or, city and county. 7 Give address. See Kerr's Stats. and Amdts. to Codes, p. 639.

§ 1106. Form. Notice of application to restore destroyed records, by order of court, and of time and place fixed for hearing. (Case of partial destruction.)

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.
[Title of form.]

Notice is hereby given, That — as administrator² with the will annexed of the estate of said decedent, and as distributee of a portion of her estate, and —, as devisee and legatee under decedent's said will, and —, as their attorney of record in said matter, have filed therein their written application, verified by affidavit, in the above-entitled proceeding, pending in and belonging to said court, showing that the original of the judgments, decrees, orders, documents, records, papers, processes, and files heretofore made, entered, or filed in the above-entitled matter, and the whole thereof, were and each of them was, entirely lost, injured, and destroyed by reason of a conflagration on the 18th and 19th days of April, 1906, except only —;³ that said loss, injury, and destruction occurred without fault or neglect of petitioners, or any of them; that they can not obtain certified copies thereof, or of either of them, except only —;⁴ and that said loss, injury, and destruction, unless supplied or remedied, will or may result in damage to them, and each of them, and praying for an order of said court, among other things, reciting what was the substance and effect of said lost, injured, and destroyed judgments, decrees, orders, documents, records, papers, processes, and files, and including those of which said certified copies are alleged to be copies; and as to the latter, praying, among other things, that said certified copies supply the defect

of their respective originals and thereafter have the same effect as the latter.

And notice is further given, That —, ⁵ the — day of —, 19—, at — o'clock in the forenoon ⁶ of said day, and the court-room of said — court, ⁷ in the said county ⁸ of —, state of —, have been fixed by the said court, as the time and place for the hearing of said application, which is here and hereby specially referred to, and made part hereof, for all particulars thereby shown.

Dated —, 19—.

—, Clerk.

[Seal]

By —, Deputy Clerk.

—, Attorney for Applicant. ⁹

Explanatory notes.—1 Give file number. 2 Or as the case may be. 3 As, except only the authenticated copy of said will and of the probate thereof in the state of —, and the official bonds given by said administrator (or administratrix), all of which are on file in said matter and not destroyed. 4 As, except as to the letters of administration issued to said —, the order of sale of real estate, the order confirming sale of real estate, and the order of partial distribution, all of which are described in and set out by copy in said petition and application, and as to which, it is averred certified copies exist, and will be produced at the hearing of said petition and application. 5 Day of week. 6 Or, afternoon. 7 State location of court-room. 8 Or, city and county. 9 Give address. See Kerr's Stats. and Amdts. to Codes, p. 639.

§ 1107. Form. Complaint to cancel, annul, and set aside deeds, with prayer for an accounting and an injunction, and for the appointment of a receiver. (In action brought by heirs against widow, both as an individual and as special administratrix.)¹

[Title of court.]

[Title of cause.]²

{ No. —. Dept. No. —.
[Title of form.]

Now come the plaintiffs above-named and ³ for cause of action against the defendants above-named aver:

First Cause of Action.⁴

1. That —, who was the father of the plaintiffs, died intestate on the — day of —, 19—, and was, at the

time of his death, a resident of the county ⁵ of —, state of —, and left a large estate in said state of —, consisting of real and personal property;

2. That on the — day of —, 19—, the defendant, —, was by order of this court, duly given and made, appointed special administratrix of the estate of said —, deceased, upon giving bond in the sum of — dollars (\$—), and she thereafter duly qualified as such special administratrix by taking the oath required by law and giving bond as required by law and by said order, and thereupon and on the — day of —, 19—, special letters of administration upon the estate of said deceased were duly and regularly issued to her by the clerk of this court, pursuant to said order, and she has ever since been, and now is, the duly appointed, qualified, and acting special administratrix of the estate of said —, deceased;

3. That the said — is the surviving wife of the said —, and was his wife for more than — years continuously next prior to his death, and is a resident of the said county ⁶ of —, state of —;

4. That the said —, deceased, left surviving him as his next of kin and only heirs at law, besides his said wife, five children, to wit: — and —, who are the plaintiffs herein, and —, —, ⁷ formerly —, and —, all of whom are of full and lawful age ⁸ and resident in the said county ⁹ of —, state of —;

5. That the said —, deceased, was at the time of his death, and for many years prior thereto had been, and was at the respective dates of the purported deeds hereinafter referred to, the owner in fee of and in the possession of, all that certain real property in the state of —, particularly described as follows, to wit: —; ¹⁰ and that plaintiffs are informed and believe, and upon such information and belief aver, that all of the said real prop-

erty hereinbefore described was the separate property of said —;¹¹

6. That the said real property situated in the said county ¹² of —, is of the value of — dollars (\$—), and upwards, and that the said real property situated in —,¹³ is of the value of — dollars (\$—), and upwards;

7. That on the — day of —, 19—, the said —, now deceased, under the circumstances herein set forth, and not otherwise, in form executed an instrument dated on that day, purporting to be a deed of conveyance from himself to defendant, —, for that portion of the said real property hereinbefore particularly described, which is situated in the said county ¹⁴ of —, which said instrument is in this complaint hereinafter designated and referred to as deed A;¹⁵ and that on the — day of —, 19—,¹⁶ the said —, now deceased, under the circumstances hereinafter set forth, and not otherwise, in form executed and acknowledged an instrument dated on that date, purporting to be a deed of conveyance from himself to said defendant, —, of all the real property then belonging to the said —,¹⁷ in the state of —, which said instrument is in this complaint hereinafter designated and referred to as deed B;¹⁸

8. That there was no consideration whatever for either of the said purported deeds, and neither of the said purported deeds was ever delivered by said —¹⁹ to the said —;²⁰

9. That each of said purported deeds was intended by the said —²¹ to be, and was in fact, an attempted testamentary disposition by him of the real property therein described to take effect at, and in case of, his death, and not otherwise, and neither of said purported deeds was signed by the said —²² in the presence of, or attested by, any subscribing witnesses or witness, and neither of said deeds was entirely written, dated, and signed by

the said —, ²³ in his own handwriting, or by his own hand. That plaintiffs are informed and believe, and upon such information and belief aver, that each of said deeds was by the said —, ²⁴ after it had been in form executed and acknowledged by him as aforesaid, deposited and left with one —, an attorney at law, who was then, and for some time prior thereto had been and thereafter and until the death of the said —, continued to be the attorney and agent of said —, ²⁵ upon the understanding that neither of said deeds should be delivered to the said —, ²⁶ nor put upon record until after the death of said —, and that each of said deeds should, during the lifetime of the said —, be subject to his control and be held by said — ²⁷ as his attorney and agent;

10. That after the death of the said —, and not sooner, the said —, ²⁸ obtained possession of both of the said purported deeds, and caused the said deed A ²⁹ to be filed for record and recorded on the — day of —, 19—, in — ³⁰ in the office of the county recorder of the county ³¹ of —, ³² state of —, and caused said deed B ³³ to be filed for record and recorded on the — day of —, 19—, in —, ³⁴ the office of the county recorder of the county ³⁵ of —, ³⁶ state of —, and that, as plaintiffs are informed and believe, and therefore aver, the said defendant, —, has caused, or is about to cause, the said B ³⁷ to be recorded in the respective offices of the county recorders of each of the said counties of — and —, etc.; ³⁸

11. That the said deeds were, and each of them was, by the said —, so in form executed and acknowledged and deposited with the said —, as aforesaid, at the instigation of the said —, ³⁹ in pursuance of a plan and scheme theretofore conceived and formed by her to obtain all of the property of the said — for herself to the exclusion of his said children;

12. That under and by virtue of the said two deeds of

—, 19—, and —, 19—, the said defendant —, claims to be the owner in fee in her own right, and in her individual capacity of all of the real property situated in the counties of — and —, etc., hereinbefore described, and claims that neither the estate, nor the heirs at law of the said —, deceased, nor herself as special administratrix of said estate, has, or have, any interest in, or title to, the said real property, or any part thereof, or any right to the possession of said real property, or any part thereof, or any right to the rents, issues, and profits of said real property, or any part thereof, and that she threatens, and intends, and is proceeding, to collect and receive the entire rents, issues, and profits from all of said real property and apply them to her own use, in her own right, and in her individual capacity, and in violation of her duty as such special administratrix of said estate;

13. That the said real property hereinbefore particularly described, situated in the counties of — and —, etc.,⁴⁰ consists of about — thousand (—)⁴¹ acres of land, suitable and used for many different purposes, including the raising of grain, hay, alfalfa, vegetables, and produce, roots for the food of stock, and for grazing, and the raising of cattle and sheep, and the production of wool, and is capable of producing, and will produce, under careful and prudent management, a very large income from the rents, issues, and profits thereof, to wit, the sum of — dollars (\$—), per annum and upwards;

That a very large part of said lands has heretofore been and can only be rented out on shares to many different tenants of many different portions and subdivisions thereof, and requires constant watching to see that the tenants on the shares properly plant, cultivate, and care for the crops raised thereon, and yield to the owner the proper share thereof at the proper times; and another very large part of said lands consists of grazing land, which is not fenced, and which can be made to produce a

large income by constant watching and protection against the trespassing of stock from adjacent lands, but not otherwise; and that it is necessary that great care, diligence, and skill be used in securing reliable and responsible tenants for all of said lands, at the proper time, and to watch carefully the conduct by such tenants of the respective parcels so rented to them in order to see that the lands are properly cared for and that no depredation or waste is committed thereon, and that the terms and conditions of the respective leases are properly carried on and complied with by such tenants;

That the said lands require the constant care and attention and supervision of some person well versed and acquainted with the various kinds of farming, grazing, and stock raising aforesaid, and with the general supervision, conduct, and management of all the various kinds of lands aforesaid, to secure reliable and responsible tenants, at the proper times, for all of said lands, and to see that the various tenants properly plant, cultivate, and care for the crops raised thereon and yield to the owner the proper shares therefor, at the proper times, and to dispose of the owner's shares of such crops to the best advantage, and to see that the said grazing lands are properly watched and protected against the trespassing of stock from adjacent lands, and to see that the terms and conditions of the various leases are properly carried out by the respective tenants, and that no waste or other depredations are committed upon any of such lands, in order to secure the fair and proper income which said lands are capable of producing;

That the defendant, —, is wholly ignorant of and unskilled in any of the kinds of business aforesaid, or in attending to any of the matters which it is necessary to attend to in and about the leasing, management, and control of said lands as aforesaid in order to secure the fair and proper income which said lands are capable of pro-

ducing under proper management, and to protect the same against the trespassing, depredation, and waste aforesaid, and if the said defendant, —, is allowed to retain the management and control of said lands pending the determination of this action, the income from the rents, issues, and profits thereof will be greatly impaired and diminished and the said lands will suffer great damage from trespass, depredation, and waste. That the loss and damage which will result from the improper and unskilled management and control of said lands by impairment and diminution from the rents, issues, and profits thereof, and from trespass, depredation, and waste as aforesaid, if the said defendant, —, is allowed to retain the management and control of said lands pending the determination of this action is, and will be, difficult and impossible of determination or estimation;

That said real property situated in the county ⁴² of — has upon it improvements rented to divers tenants and produces a monthly income of — hundred dollars (\$—) per month and upwards; and

14. That by reason of the facts hereinbefore alleged, it is proper and necessary for the protection of the rights of these plaintiffs that a receiver be appointed to take the possession, management, and control of all of the real property hereinbefore described, and to attend to the renting and leasing of said real property, and to collect and receive all the income from the rents, issues, and profits thereof and hold the same subject to such disposition thereof as may be directed by the court upon the final determination of this action.

Second Cause of Action.⁴³

And for a further and separate cause of action against the defendants above-named, the plaintiffs above-named aver as follows:

1. The plaintiffs here repeat and allege, and re-aver all the matters and things set forth and alleged in the sub-

divisions numbered 1, 2, 3, 4, 5, 6, and 7 of the statement of the first cause of action in this complaint and pray that the same be taken and deemed a part of this cause of action the same as though herein set out at length;

2. That there was no consideration whatever for either of the said purported deeds;

3. (Repeat statements contained in subdivision numbered 10 of the first cause of action in this complaint);

4. That the said formal execution and acknowledgment, by the said —, now deceased, of each of the said deeds A and B,⁴⁴ was procured by and through the undue influence of his said wife, the defendant, —, and that the facts constituting such undue influence are as follows:

That for a long time, to wit, about — years prior to his death, the said —, now deceased, was, and until the time of his death continued to be, afflicted with disease of both body and mind, and by reason thereof he became and was weak and ill, both in body and mind, and his mind was so weakened that he became childish and was unable at times to talk, or to understand knowingly the ordinary affairs of life or to understand or to transact business;

That while the said — was in such condition of mind and body, he was incapable of taking care of himself, and was in constant need of the care and attention of some other person to see that his wants were properly administered to; and during all of said period he resided with, and was taken care of by, his said wife, the defendant, —, at their home in the county of —,⁴⁵ state of —, and was entirely dependent upon her for the care and attention of which he was in need by reason of his disease of body and mind as aforesaid;

That by reason of the said diseased condition of body and mind of the said —, and by reason of his being dependent upon his said wife for the care and attention of which he was in need, as aforesaid, his said wife, the de-

fendant, —, acquired and had, at the time of the said formal execution and acknowledgment, as aforesaid, of each of said purported deeds, a great and controlling influence over the mind and will of said —, and was thereby able to and did direct and dictate to him what he should do in matters relating to his property, and his condition was such, in his then weak condition of mind and body, that he feared to do otherwise than as his said wife dictated and directed him to do in matters relating to his property;

That while the said — was in the said condition of body and mind as aforesaid, and while he was so, as aforesaid, in the care and under the domination and control of the said —,⁴⁶ she, the said —, conceived and formed the plan and scheme of procuring the said —⁴⁷ to convey by deed all of his real property to her in order that she might obtain the same for herself to the exclusion of his children; and she, the said —, in pursuance of the said plan and scheme, with the intent, and for the purpose, of procuring the said — to execute the said deeds, taking an undue and unfair advantage of his said condition and of her domination and control over him, as aforesaid, and taking a grossly oppressive and unfair advantage of his necessities and distress of mind and body, at and many times before the time of the formal execution of each of said purported deeds, did state to the said —⁴⁸ that his children were spendthrifts, and would not and could not preserve or take care of any property which they might receive from his estate at his death, and that his said children had no filial affection for him and were anxiously awaiting his death to obtain his property and squander the same; and at, and many times before, the time of the formal execution of each of said purported deeds, did demand of the said —,⁴⁹ that he convey all of his real property to her, the said —; and at, and many times before, the formal execution of each of said

purported deeds, did threaten him that, if he did not do as she wished concerning the disposition of his property, she would cause him great trouble during his lifetime, and would cause him to be adjudged an incompetent person, and would cause a guardian to be appointed for his person and estate, and that a large part of his estate would be dissipated in litigation;

That by means of the said statements, threats, and demands of the said —, ⁵⁰ hereinbefore alleged, she, the said —, did so prevail upon and influence the said —, in his then weakened condition of mind and body, both at the time of the said formal execution of the said deed A, ⁵¹ and at the time of the said formal execution of the said deed B, ⁵² that he, the said —, was compelled to and did, against his will and wish, in form, execute and acknowledge the said deeds; and

That all of the said statements so made by the said —, ⁵² were untrue, and were known by her, at the time they were made, to be untrue, and the same were made by her for the purpose of prejudicing, and did prejudice, the said —, ⁵⁴ against these plaintiffs and the balance of his children;

And plaintiffs further allege, with reference to said deed A, ⁵⁵ that the said — ⁵⁶ was, at the time of the said formal execution and acknowledgment of said deed, as aforesaid, and for a long time prior thereto had been, a prominent and zealous member of a certain society of religious enthusiasts;

That the said —, before he became weak and ill in body and mind as aforesaid, was not particularly interested in matters of religion, nor in the affairs of any religious society, but by reason of the undue influence, domination, and control exercised over him by his said wife in his said weak condition of mind and body as aforesaid, he was persuaded and unduly influenced by her to believe that his prosperity and success in business

matters, as well as the salvation of his soul, depended upon his appropriating some part of his estate to religious uses, and, by reason of such belief so induced by her to execute and acknowledge in form, as aforesaid, the said deed A ⁵⁷ to her in order that she might, and upon her representation to him that she would, use and apply the said real property described therein, and the income therefrom, for the benefit of the religious society and similar societies. That the said property described in said last-named deed is of the value of — thousand dollars (\$—), and upwards, and produces a monthly income of — hundred dollars (\$—), and upwards; and that if the said — had been free from the said undue influence, domination, and control of his said wife he would not have been willing to convey or appropriate the said property, nor any substantial part of his property, for the religious purposes aforesaid, nor for any religious purpose;

That the said —, by reason of his condition of mind and body as aforesaid, at the time of the said formal execution and acknowledgment, as aforesaid, of each of the said deeds, was unable to resist the said undue influence of the said —,⁵⁸ hereinbefore alleged, and being then and there under the domination and control of the said —, as aforesaid, and by reason of the said undue influence of the said —, hereinbefore alleged, as aforesaid, did in form execute and acknowledge the said deed A,⁵⁹ and the said deed B;⁶⁰ and

That if the said — had been free from the said undue influence so exercised over him, as aforesaid, by the said —, he would not have executed or acknowledged the said deeds or either of them in form or otherwise;

5. That under and by virtue of the said two deeds, A and B,⁶¹ the said defendant, —, claims to be the owner in fee in her own right, and in her individual capacity, of

all of the real property situated in the counties of — and —, etc.,⁶² hereinbefore described, and claims that neither the estate, nor the heirs at law of the said —, deceased, nor herself as special administratrix of said estate, has, or have, any interest in, or title to the said real property, or any part thereof, or any right to the possession of said real property, or any part thereof, or any right to the rents, issues, and profits of said real property, or any part thereof, and that she threatens, and intends and is proceeding, to collect and receive the entire rents, issues, and profits from all of said real property and apply them to her own use, in her own right, and in violation of her duty as such special administratrix of said estate;

6. And the plaintiffs here repeat and allege, and reaver all the matters and things set forth and alleged in the subdivisions numbered 13 and 14 of the statement of the first cause of action in this complaint, and pray that the same be taken and deemed a part of this cause of action the same as though herein set out at length.

Third Cause of Action.⁶³

And for a further and separate cause of action against the defendants above-named these plaintiffs aver as follows:

1. Plaintiffs here repeat and allege, and reaver all the matters and things set forth and alleged in subdivisions numbered 1, 2, 3, and 4, of the statement of the first cause of action in this complaint, and pray that the same be taken and deemed a part of this cause of action the same as though herein set out at length;

2. That the said —, deceased, was at the time of his death, and for many years prior thereto had been, and was, at the date of the deed in this cause of action hereinafter referred to, to wit, —,⁶⁴ the owner in fee of, and in the possession of, all that certain real property in the state of —, which is particularly described in the sub-

division numbered 5 of the statement of the first cause of action in this complaint, and the plaintiffs here refer to the said particular description of all the real property in the state of —, which is particularly described in the said subdivision numbered 5 of the statement of the first cause of action in this complaint, and pray that the same be taken and deemed a part of the statement of this cause of action the same as though herein set out at length;

3. That the said property situated in the county of —,⁶⁵ is of the value of — thousand dollars (\$—), and upwards, and that the said real property situated in the counties of — and —, etc.,⁶⁶ is of the value of — millions of dollars (\$—), and upwards;

4. That on the — day of —, 19—,⁶⁷ the said —, now deceased, under the circumstances hereinafter set forth, and not otherwise, in form executed and acknowledged an instrument dated on that date, purporting to be a deed of conveyance from himself to the defendant, —, of all the real property then belonging to the said —, in the state of —, which said instrument is in this complaint hereinafter designated and referred to as deed B;⁶⁸

5. That there was no consideration whatever for said deed B;⁶⁹

6. That after the death of the said —, and not sooner, the said —⁷⁰ obtained possession of said deed B,⁷¹ and caused the same to be filed for record and recorded on the — day of —, 19—, in —⁷² in the office of the county recorder of the county of —, state of —, and that, as plaintiffs are informed and believe, and therefore aver, said defendant, —, has caused or is about to cause, the said deed B,⁷³ to be recorded in the respective offices of the county recorders of each of the other counties in which is situated any part of said real property hereinbefore referred to;

7. That the said formal execution and acknowledgment

of the said deed B,⁷⁴ was procured by and through the fraud of his said wife —, and that the facts constituting such fraud are as follows:

That at and before the time of the said formal execution of said deed, the said —,⁷⁵ with intent to deceive the said —, now deceased, and to induce him to execute the said deed, promised to the said —, that if he, the said —, would execute and acknowledge a deed to her, the said —, of all his real property in the state of —, she, the said —, could and would, after his death, divide all of the said property equally and proportionately among all of his said children and herself, according to the laws of inheritance of the state of —, and represented to him that such a course would save a large amount of expense which would otherwise be necessary in and about the administration of his estate after his death;

That the said — believed and relied upon the said promise, and was by the said promise induced to execute and acknowledge in form the said deed B,⁷⁶ and that the said — would not in form, or at all, have executed or acknowledged the said deed as aforesaid, if the said promise had not been made;

That the said promise upon the part of the said — was made by her without any intention on her part of ever performing it, and that she has, since the death of the said —, and also prior to his death, but without his knowledge, repudiated the said promise, and that she has since his death refused, and still refuses, to carry out or to perform said promise or any of the terms and conditions of said promise, and repudiates the same entirely;

8. That whatever title passed to, or vested in, the said —,⁷⁷ under or by virtue of the said deed B,⁷⁸ in or to any of said real property hereinbefore referred to, is held by her in trust for these plaintiffs to the extent of such interest therein as they would have succeeded to

under the laws of succession of the state of —, as heirs at law of said —, deceased, if said deed B ⁷⁹ had not been made, and the said —⁸⁰ had been the owner of said real property at the time of his death;

That plaintiffs are informed and believe, and upon such information and belief aver, that all of the said real property hereinbefore referred to was the separate property of the said —,⁸¹ and that the interest therein of these plaintiffs, as his heirs at law, was and is the undivided —⁸² of all of said real property; and

9. That under and by virtue of the said deeds the said —⁸³ claims to be the owner in fee in her own right, and in her individual capacity, of all of the said real property, and claims that neither the estate nor the heirs at law of the said —, deceased, nor herself as special administratrix of said estate has, or have, any interest in, or title to, the said real property, or any part thereof; nor any right to the possession of said real property, or any part thereof, nor any right to the rents, issues, and profits of said real property, or any part thereof, and that she threatens, and intends to and is proceeding, to collect and receive the entire rents, issues, and profits from all of said real property and apply them to her own use, in her own right, and in her individual capacity.

10. And these plaintiffs here repeat and allege, and re-aver all the matters and things set forth and alleged in the subdivisions numbered 13 and 14 of the statement of the first cause of action in this complaint, and pray that the same be taken and deemed a part of this cause of action the same as though herein set out at length.

Fourth Cause of Action.⁸⁴

And for a further and separate cause of action against the defendants above-named, the plaintiffs above-named aver as follows:

1. These plaintiffs here repeat and allege, and re-aver all the matters and things set forth and alleged in the

subdivisions numbered 1, 2, 3, 4, 5, 6, and 7 of the statement of the first cause of action in this complaint, and pray that the same be taken and deemed a part of this cause of action the same as though herein set out at length;

2. That there was no consideration whatever for either of said purported deeds;

3. (Repeat statements contained in subdivision numbered 10 of the first cause of action in this complaint);

4. That at the time when the said — in form executed and acknowledged each of the said purported deeds as aforesaid, the said — was, and thereafter and up to the time of his death continued to be, a person of unsound mind;

5. That the said deeds were, and each of them was, by the said — so in form executed and acknowledged at the instigation of the said —, in pursuance of a plan and scheme theretofore conceived and formed by her to obtain all of the property of the said — for herself to the exclusion of his said children; and

6. (Repeat the subdivision numbered 12 of the statement of the first cause of action);

7. The plaintiffs here repeat and allege, and re-aver all the matters and things set forth and alleged in the subdivisions numbered 13 and 14 of the statement of the first cause of action in this complaint, and pray that the same be taken and deemed a part of this cause of action the same as though herein set out at length.

Wherefore plaintiffs pray for a decree of this court as follows:

Canceling, annulling, and setting aside the said deeds A and B,⁸⁵ and the record thereof, in whatever counties the same have been heretofore or may hereafter be recorded, and declaring the said deeds and each of them and the record thereof as aforesaid to be void and of no effect, and that no right, title, interest, or estate passed

to the said defendant —, under, or by virtue of, either of said deeds in or to any of the property described or referred to therein; and

Adjudging and decreeing that the real property described and referred to in said deeds was owned in fee simple by the said —, deceased, at the time of his death, and that the same constituted part of the property of his estate subject to administration;

Adjudging and decreeing that the title to said real property is vested in the said —, and the said —, —, —, —, and —,⁸⁶ as the widow and children of said —, in accordance with the laws of succession of the state of —, subject only to the control of this court sitting as a court of probate, in the matter of administering upon the estate of said deceased, and to the possession of any administrator appointed for said estate, and that the said defendant, —, in her individual capacity, has no right, title, interest, or estate in or to the said real property, or any part thereof, other than such as she may have acquired under the laws of succession of this state as the surviving wife of the said —, deceased, and that she be forever enjoined from asserting any other right, title, interest, or estate in or to the said real property or any part thereof;

That the said defendant, —, be enjoined and restrained, pending the final determination of this action, from conveying or incumbering, or in any manner disposing of, any of the said real property, or any of the rents, issues, and profits thereof, and that such injunction be made perpetual by the said final decree herein;

That an accounting be taken of all the rents, issues, and profits collected or received by the said —⁸⁷ from the said real property, or any part thereof, and that she be adjudged to hold the same in her capacity as special administratrix of the estate of the said —, deceased, and

that she be required to account for and charge herself with the same in her account as such; and

Adjudging and decreeing that whatever title passed to, or is vested in, the said defendant, —, under or by virtue of the said deed B,⁸⁸ in or to any of the said real property situated in the counties of — and —, etc.,⁸⁹ is held by her in trust for these plaintiffs to the extent of the undivided —⁹⁰ thereof and requiring her to convey to these plaintiffs the said undivided —⁹¹ thereof, and to account for and pay over to these plaintiffs —,⁹² of all the rents, issues, and profits collected or received by her from said real property, or any part thereof, situated in the counties of — and —, etc.⁹³

And the plaintiffs further pray that a receiver be appointed in this action to take possession, management, and control of all of the real property in this complaint hereinbefore described and to attend to the renting and leasing of the said real property and to collect and receive all of the rents, issues, and profits thereof and hold the same subject to such disposition thereof as may be directed by the court upon the final determination of this action.

And plaintiffs pray for such other, further, and different relief as the justice and equity of their case may entitle them to receive, and which may appear to the court to be meet and proper in the premises; and for their costs of suit herein.

— and —, Attorneys for Plaintiffs.

Dated —, 19—.

Verification of Complaint.

State of —, }
County ⁹⁴ of —, } ss.

—, being duly sworn, says, That he is one of the plaintiffs in the within-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as

to such matters as are therein stated upon information or belief, and that as to those matters he believes it to be true. —.

Subscribed and sworn to before me this — day of —, 19—. —, Notary Public, etc.⁹⁵

[Seal]

Explanatory notes.—1 As, — and —, Plaintiffs v. Mary Stiles and Mary Stiles as Special Administratrix of the Estate of —, Deceased, Defendants. 2 As given in note 1. 3 If amended complaint is filed continue; by leave of court first had and obtained file this their first amended complaint and, etc. 4 No consideration; nor delivery; attempted testamentary disposition. 5, 6 Or, city and county. 7 Married name of female heir. 8 Or, as the fact may be. 9 Or, city and county. 10 Give full and detailed description of each and every parcel of land owned by deceased, in his lifetime, in whatever county or counties of the state the same is situated. 11 The deceased. 12 Or, city and county, wherein suit is brought. 13 Various other counties of the state, giving their names. 14 Or, city and county, wherein suit is brought. 15 For the purposes of this form. In the complaint itself it should be referred to as the deed of —, giving its exact date. 16 These two deeds are supposed to have been made about a year apart. 17 Deceased. 18 See note 15. 19 Deceased. 20 Defendant. 21-25 Deceased. 26 Defendant. 27 Attorney. 28 Defendant. 29 See note 15. 30 Give book and page of deeds in which record was made. 31 Or, city and county. 32 Where suit is brought. 33 See note 15. 34 Give book and page of deeds in which record was made. 35 Or, city and county. 36 Naming the county, outside of the one in which suit is brought, in which the record was made. 37 See note 15. 38 Naming the various other counties in which the decedent, in his lifetime, owned property. 39 Defendant. 40 Various counties outside of that in which suit is brought. 41 Figures. 42 In which suit is brought. 43 Undue influence of wife. 44 Give exact date of each. 45 Wherein suit is brought. 46 Defendant. 47-50 Decedent. 51, 52 Give exact dates. 53 Defendant. 54 Deceased. 55 Give exact date. 56 Defendant. 57 Give exact date. 58 Defendant. 59-61 Give exact dates. 62 All counties in which deceased owned real estate. 63 No consideration and fraud. 64 Give exact date of deed B. 65 Wherein suit is brought. 66 Other counties than that in which suit is brought. 67-69 Give exact date of deed B. 70 Defendant. 71 Give exact date. 72 Give book and page of deeds. 73, 74 Give exact date. 75 Defendant. 76 Give exact date. 77 Defendant. 78, 79 Give exact date. 80, 81 Deceased. 82 Give fractional part. 83 Defendant. 84 No consideration and unsoundness of mind. 85 Give exact dates. 86 Give both married and family names of married female children. 87 Defendant. 88 Give exact date. 89 All counties in which decedent owned lands. 90-92 Give fractional part. 93 All counties in

which decedent owned lands. ⁹⁴ Or, city and county. ⁹⁵ Or other officer taking the oath. The statute of California permits the verification of a pleading to be made on information "or" belief. It does not require it to be made on information "and" belief.—See Kerr's Cyc. Code Civ. Proc., § 446. Under such a statute it would seem that the affiant may swear to what he "believes" to be true, though he has no information on the subject; or, he may swear to facts as to which he has been informed though he may have no belief as to their truth. A verification of an answer, however, under such statute, made on information "and" belief, is not necessarily defective.—*Christopher v. Condogorge*, 128 Cal. 581, 584. A verification upon information "and" belief, though not complying in form with the exact language of the statute, is sufficient.—*Ely v. Frisbie*, 17 Cal. 250, 257. Such a verification is a substantial compliance with the statute.—*Kirk v. Rhoads*, 46 Cal. 398, 403.

TESTIMONY OF PARTIES, OR PERSONS INTERESTED, FOR OR AGAINST REPRESENTATIVES, SURVIVORS, OR SUCCESSORS IN TITLE OR INTEREST OF PERSONS DECEASED OR INCOMPETENT.

1. Application of statute.
 - (1) In general. California statute.
 - (2) Statutes of other states. Alaska.
 - (3) Same. Arizona.
 - (4) Same. Kansas.
 - (5) Same. Montana.
 - (6) Same. Nevada.
 - (7) Same. New Mexico.
 - (8) Same. South Dakota.
 - (9) Same. Utah.
 - (10) Same. Washington.
 - (11) Equal footing, and equal balance of disadvantages.
 - (12) Meaning of terms.
2. Particular matters to which statute does not apply.
 - (1) In general.
 - (2) Claim in favor of estate.
 - (3) Controversies as to relative rights of heirs or devisees.
 - (4) Actions to quiet title.
3. Who are competent.
 - (1) In general.
 - (2) Parties not interested.
 - (3) Party may testify to what in general.
 - (4) Party may testify to what in particular.
 - (5) Employees, clerks, agents, etc.
 - (6) Officers and stockholders of corporations.
- (7) Widow of deceased.
- (8) Competency in other particular instances. In general.
- (9) Same. Contest of will or of its probate.
- (10) Same. Promissory notes, mortgages, and foreclosure.
4. Sufficiency of evidence.
5. Who are incompetent.
 - (1) In general.
 - (2) Executors and administrators.
 - (3) Purpose of statute and duty of court.
 - (4) Parties can not testify to what in general.
 - (5) Parties can not testify to what in particular.
 - (6) Partnership affairs, in general.
 - (7) Action by or against surviving partner.
 - (8) Action on note indorsed to partnership.
 - (9) Specific performance.
 - (10) Implied contract.
 - (11) Deeds.
 - (12) Claims against estate.
 - (13) Same. Physician's services to deceased.
 - (14) Fraud.

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| (15) Gifts. | (18) Contest of will, or of its probate. |
| (16) Promissory notes. | (19) Incompetency in other particular instances. |
| (17) Establishment and enforcement of trusts. | |

1. Application of statute.

(1) In general. California statute.—At one time, a party was prohibited from testifying, in any case where the adverse party was “the representative of a deceased person,” as to facts which occurred before the death of the deceased; but this law has been changed in California to the provision that a party can not be a witness in an action against an executor or administrator “upon a claim or demand against the estate of a deceased person.”—*Booth v. Pendola*, 88 Cal. 36, 43, 23 Pac. 200, 25 Pac. 1101; and it is settled, in such state, that the provision applies only to actions upon such claims or demands against the decedent as might have been enforced against him, in his lifetime, by personal action for the recovery of money, and upon which a money judgment could have been rendered.—*Wadleigh v. Phelps*, 149 Cal. 627, 640, 87 Pac. 93, 99. The incompetency of the witness applies only to those parties who assert claims against the estate.—*Todd v. Martin*, 4 Cal. Unrep. 805, 37 Pac. 872, 874. But the statute applies not only to parties who have an interest adverse to the estate but to all nominal parties to the action.—*Blood v. Fairbanks*, 50 Cal. 420, 422. It is considered that the word “parties,” in the California statute, does not refer to the executor or administrator who is the party defendant. If, however, the executor or administrator is the assignor of the claim asserted by the plaintiff, or is a person for whose benefit it is prosecuted, or himself asserts a claim, as he may do, the other language of the section is sufficient either to fix him as the party prosecuting the claim, or as the party for whose benefit it is prosecuted, and, upon that ground, to make him incompetent, but it does not do so simply because he is the party defendant.—*Todd v. Martin*, 4 Cal. Unrep. 805, 37 Pac. 872, 874. Where an action has been delayed for about seven years, and until after the distribution of the estate, and such action is brought against the distributees of the decedent's estate for the purpose of avoiding the incompetency of the plaintiff to testify against the estate, the statute of limitations ought to apply to the action.—*Nicholson v. Tarpey*, 124 Cal. 442, 450, 57 Pac. 457. A court will not allow the doctrine of estoppel to be invoked so as to defeat the statute relative to testimony as to transactions with deceased persons. Thus were an action was brought against “Hanson & Co.,” an alleged co-partnership, but Charles Hanson afterward died, and the executors of his will were substituted as defendants, and a judgment was entered against the executors, “payable in due course of administration,” and the estoppel set up by the plaintiff was, that plaintiff had been induced by Charles Hanson to engage with Hanson & Co., believing the latter to be a co-partnership, and that neither Charles Hanson nor his represen-

tatives could be heard to dispute the fact; that the claim sued upon was not against the estate, but was against the partnership; that it was not "an action pending against the decedent at the time of his death"; and that the section of the statute relative to testimony as to transactions with deceased persons did not apply, the court held that the statute could not be thus evaded, especially where the claim against the estate was not presented to the executors in accordance with law. In other words, one statute was violated in order to create a situation which would render the other statute inapplicable, or which would permit its violation.—*Frazier v. Murphy*, 133 Cal. 91, 98, 65 Pac. 326. The California statute is not to be construed as prohibiting an executor or administrator from calling a party to the action to testify in behalf of the estate.—*Chase v. Evoy*, 51 Cal. 618, 620. The California statute, relating to the admissibility of witnesses generally, does not apply to the testimony of a party who is specifically made incompetent as a witness.—*Rose v. Southern Trust Co.*, 178 Cal. 580, 174 Pac. 28.

REFERENCES.

Statute against admission of evidence of transaction with decedent as applicable to deposition taken before death.—See note 21 *Ann. Cas.* 1265.

(2) **Statutes of other states. Alaska.**—The federal statute which prohibits either party to an action by or against an executor, administrator, or guardian from testifying against the other as to any transaction with, or statement by, the testator, intestate, or ward, does not apply to territorial courts.—*Corbus v. Leonhardt* (Alaska), 114 Fed. 10, 51 C. C. A. 636.

(3) **Same. Arizona.**—The statute of Arizona provides that "In an action by or against executors, administrators, or guardians in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." The evident purpose of this statute was to leave the competency of either party's testimony, respecting such "transaction" or "statement," to the sound discretion of the court.—*Goldman v. Sotelo*, 7 Ariz. 23, 60 Pac. 696, 697.

(4) **Same. Kansas.**—The Kansas statute, which prohibits a party from testifying in his own behalf, in respect to any transaction or communication had personally with a deceased person, etc., applies only to a party to the suit.—*Mendenhall v. School District*, 76 Kan. 173, 90 Pac. 773. It is the witness who is incompetent, not the evidence. Hence an objection that the evidence is incompetent does not reach the incompetency of the witness.—*Crebbin v. Jarvis*, 64 Kan. 885, 67 Pac. 531, 532. In an action by a son to set aside a deed made by his deceased father to a stranger without consideration, the introduction

by the plaintiff of letters written him by his father at the time of the transaction, for the purpose of showing the grantor's mental condition, does not violate the statute barring testimony, by a party interested, of conversations or transactions had by him with a decedent; the statute is directed against, not the transactions or communications themselves, but the qualifications of the witness.—*Munger v. Meyers*, 96 Kan. 743, 153 Pac. 497. The statute forbidding a party to testify in his own behalf as to any transaction had personally with a decedent, etc., has no application to the admissibility in evidence in an action to establish a resulting trust, of a letter written by defendant's intestate to plaintiff, wherein he stated that he held the real estate in question as her agent.—*Garten v. Trobridge*, 80 Kan. 720, 104 Pac. 1067. The rule barring testimony by interested persons as to conversations and transactions with deceased persons can not be violated because of some professed purpose to show the state of the decedent's mind at the time.—*Brown v. Brown*, 96 Kan. 510, 152 Pac. 646. The rule, whereby a person interested can not testify as to transactions or conversations had with a decedent, is relaxed when the interested person is interrogated as to such on cross-examination.—*Poole v. Poole*, 96 Kan. 84, Ann. Cas. 1918b, 929, 150 Pac. 592. The rule excluding testimony as to conversations with a person since deceased, had by a party interested in the cause, does not extend to such conversations had by the husband of a party interested.—*Cadwalader v. Pyle*, 95 Kan. 337, 342, 148 Pac. 655.

(5) *Same. Montana.*—Section 7891 of the Revised Codes of Montana was adopted from the Code of California, but the court of Montana declined to follow the construction given it by the courts of California, on the ground that such construction did not seem to be reasonable.—*Delmoe v. Long*, 35 Mont. 139, 153, 88 Pac. 778. (Citing Code Civ. Proc., § 3162.)

(6) *Same. Nevada.*—The statute of Nevada precludes the defendant, in a suit to establish a resulting trust in corporate stock alleged to be held by him as trustee for the plaintiff's testator, from testifying as to any transactions between himself and the testator; but it does not disqualify a witness from testifying as to matters or things brought forth by opposing witnesses, which appear to be outside of the transaction and out of the presence and hearing of the deceased party.—*Torp v. Clemons*, 37 Nev. 474, 483, 142 Pac. 1115.

(7) *Same. New Mexico.*—In a suit on a claim against the estate of a decedent the corroborating evidence must, under the statute of New Mexico, be such as would, standing alone and unsupported by the evidence of the claimant, tend to prove the essential allegation or issue raised by the pleadings.—*National Rubber S. Co. v. Oleson & Exter*, 20 N. M. 624, 151 Pac. 694. Where the statute requires the claimant's testimony, in a suit against the executor of a deceased

person, to be corroborated, a claim can not be established without corroboration.—*Childers v. Hubbell*, 15 N. M. 450, 110 Pac. 105.

(8) Same. South Dakota.—In a statute providing that in civil actions or proceedings by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered or order entered, for or against them, neither party shall be allowed to testify against the other, as to any transaction whatever with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party, the word "party" is used in its technical sense, and does not include one who is not a party, though he may have a beneficial interest in the result of the issue.—*Witte v. Koeppen*, 11 S. D. 598, 74 Am. St. Rep. 826, 79 N. W. 831, 832. Where, after paying one of several notes, executed by virtue of the terms of a land contract, the maker assigns the contract to a creditor by way of security, and the creditor pays the notes and takes a deed and subsequently dies; in a suit by the administrator against such maker, for strict foreclosure of the land contract, the defendant may introduce as evidence of payment the notes mentioned, regardless of the statute barring evidence, by the defendant, relating to a transaction had, or a conversation with a deceased person; such statute was not directed against or intended to exclude any such evidence.—*Stone v. Leavitt*, 40 S. D. 467, 168 N. W. 28.

(9) Same. Utah.—In Utah, the disqualification, under the statute, has been held to apply whether the action has been brought by or against an administrator.—*Ewing v. White*, 8 Utah 250, 30 Pac. 984. While the statutes of the various states upon this subject differ somewhat, there is an underlying principle upon which all of them are founded. The purpose of these statutes is to guard against the temptation of giving false testimony in regard to a transaction in question, on the part of a surviving party, and further, to put the two parties to the suit upon terms of equality in regard to the opportunity of giving testimony. The scope of the rule excludes the testimony of the survivor of the transaction with the decedent when offered against the latter's estate. The statute, in this regard, is intended to protect the estates of the deceased persons from assaults, and relates to proceedings wherein the decision sought by the party so testifying would tend to reduce or to impair the estate.—*In re Miller's Estate*, 31 Utah 415, 88 Pac. 338, 344.

(10) Same. Washington.—The Washington statute does not disqualify an interested witness on the part of the estate; its prohibition extends only to transactions had by the plaintiff with the deceased or to statements made to the plaintiff by the deceased; it does not extend to every fact to which the deceased might testify if living.—*O'Connor v. Slatter*, 48 Wash. 493, 496, 93 Pac. 1078. The receipt or delivery of a deed is a transaction falling within the purview of this statute, which provides that in an action or proceeding when the

adverse party sues as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from, any deceased person, a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him by, any such deceased person.—*White v. Walker*, 84 Wash. 652, 147 Pac. 409. The prohibition of the Washington statute is against a party in interest or to the record, testifying "in his own behalf"; hence, where the defendants, a man and his wife, claim title to distinct properties through separate deeds of gift, in an action brought by an heir to quiet title to the properties, neither defendant is competent to testify in his or her own behalf, but each is competent to testify in behalf of the other.—*Showalter v. Spangle*, 93 Wash. 326, 160 Pac. 1042. The rule as to the competency of witnesses, notwithstanding interest in the event of the action in which they are called to testify, applies in all cases to litigating parties, except when sued or suing as executor or administrator of a deceased person, or as guardian or conservator of the estate of an insane person.—*Marks v. City of Seattle*, 88 Wash. 61, 152 Pac. 706; *Hart v. Bogle*, 88 Wash. 125, 152 Pac. 1010. Where a person promised to pay an attorney's fee but afterwards died, and an independent action was brought upon such promise, evidence as to transactions preliminary to the original contract was inadmissible, under the statute of Washington, either for the promisee or the plaintiff.—*Hart v. Bogle*, 88 Wash. 125, 152 Pac. 1010. The mere identification of the signature of a deceased person on a receipt does not come within the terms of the statute providing against a party's testifying in his own behalf, as to any transaction had by him with a deceased person, in an action on such transaction by or against him, in which action the executor or administrator of the deceased is the other party.—*Goldsworthy v. Oliver*, 93 Wash. 67, 160 Pac. 4. The statute does not disqualify one from being a witness. It only prohibits him from telling "of any transactions had by him with, or any statements made to him by," the decedent.—*Kauffman v. Bailie*, 46 Wash. 248, 89 Pac. 548, 550. "The evident purpose of this statute," said Mount, C. J., in rendering the opinion of the supreme court, in a comparatively late case, of the state of Washington, "is to prevent those whom it covers from detailing any transaction with the deceased which it would be to the interest of the deceased if living to deny. This purpose has been expressed thus: death having closed the lips of one party, the law closes the lips of the other. The inhibition is for the benefit of the estate to shield it from the enforcement of claims that otherwise could not be defended against. It is not to be used as a sword to deprive the estate of testimony that otherwise would be admissible. In other words, living mouths are closed when death prevents adverse testimony, but not when death only prevents confirmatory or supporting evidence.—*In re Cunningham's Estate*, *Fidelity Nat. Bank v. Cunningham*, 94 Wash. 191, 161 Pac. 1193.

(11) **Equal footing, and equal balance of disadvantages.**—The purpose of the statute relative to testimony as to transactions of deceased persons is to prevent parties from testifying to matters tending to establish the claim or demand, and not to prevent their testifying to other matters which may arise incidentally.—*Knight v. Russ*, 77 Cal. 410, 413, 19 Pac. 698. It is true that it may be a hardship upon the plaintiff to be prevented, by the law, from contradicting the testimony of third persons as to admissions not made in the presence of deceased, but, on the other hand, it can be said with equal force, that it is a hardship on the estate that the deceased is prevented, by death, from denying any admissions against his interest which witnesses for the plaintiff may testify were made by him in his lifetime. The manifest object and purpose of the statute is to put them on an equal footing in respect to such evidence. And, besides, there is nothing in the statute to indicate that its effect was intended to be limited to things which occurred in the presence of the deceased. The language is: "any matter or fact occurring before the death of the deceased," and this applies as well to things occurring without his presence, as to those in which he might have participated.—*Stuart v. Lord*, 138 Cal. 672, 677, 72 Pac. 142. In cases of actions on claims against an estate, the rule that a plaintiff need not prove the necessary allegation of non-payment may sometimes place the executor or administrator at a disadvantage. But this disadvantage is about equally balanced by the provisions of the statute relative to testimony as to transactions with deceased persons, which disqualifies parties and assignors of parties to an action, as witnesses, upon a claim or a demand against the estate of a deceased person, "as to any matter of fact occurring before the death of such deceased person." In the one case, the law, and in the other, death, has closed the mouth of the party most likely to know the fact.—*Hurley v. Ryan*, 137 Cal. 461, 462, 70 Pac. 292. The inability of a claimant against the estate of a decedent to testify against an executor or administrator is his misfortune. He must produce evidence to sustain his cause of action.—*Lichtenberg v. McGlynn*, 105 Cal. 45, 48, 38 Pac. 541; *Barthe v. Rogers*, 127 Cal. 52, 59 Pac. 310; *Stuart v. Lord*, 138 Cal. 672, 677, 72 Pac. 142. In Oregon, one who has a claim against the estate of a deceased person is a competent witness, but the statute requires him to establish his claim upon some competent and satisfactory evidence other than his own testimony. If he does this, he can recover; otherwise not.—*Goltra v. Penland*, 45 Or. 254, 77 Pac. 129; *Bull v. Payne*, 47 Or. 580, 84 Pac. 697; *Harding v. Grim*, 25 Or. 506, 36 Pac. 634.

(12) **Meaning of Terms.**—The term "claims," standing by itself in the probate law, has reference only to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal action for the recovery of money, and upon which a money judgment only could have been rendered.—*Fallon v. Butler*, 21 Cal. 24, 32, 81 Am. Dec. 140. Where a fire destroyed a kiln on leased premises,

a witness who had assigned all his interest in the lease and business before the fire, is not the "assignor" of a cause of action brought after the fire for the breach of a contract by the lessor to replace the kiln. Hence he is not incompetent to testify to events occurring before the death of the lessor, who died after the fire, under a statute which provides that an "assignor" shall not be a witness upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person.—*Frey v. Vignier*, 145 Cal. 251, 252, 254, 78 Pac. 733. The words "adverse party," as used in the Kansas statute, are not limited to the adversary positions of plaintiff and defendant, but affect any party, whether plaintiff or defendant, whose interests are actually adverse to those of another party to the action, who appears in the capacity of executor, administrator, heir at law, next of kin, surviving partner, or assignee, where the latter has acquired title to the cause of action immediately from a deceased person.—*American Inv. Co. v. Coulter*, 8 Kan. App. 841, 61 Pac. 820. In a statute, which excludes as incompetent, with certain specified exemptions, the testimony of one having a direct legal interest in the result of any civil action or proceeding, concerning any transaction or conversation occurring between the witness and a person since deceased, when the adverse party is the representative of such deceased person, the word "transaction" embraces every variety of affairs which forms the subject of negotiations or actions between the parties. The prohibition is general, and applies to written as well as to verbal transactions. No transaction with or statement by a deceased person is excepted, but all are included; and a party, who has a direct legal interest in the result of an action, is precluded from testifying against the representative of a deceased person as to any transaction or conversation between the witness and such deceased person, except in the instances specifically enumerated in the statute.—*Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771; *Smith v. Perry*, 52 Neb. 738, 73 N. W. 282; *Harte v. Reichenberg*, 3 Neb. (Unof.) 820, 92 N. W. 987. And the word "representative," in such a statute, includes any person or party who has succeeded to the rights of the decedent, whether by purchase, descent, or operation of law.—*Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771. The word "claim" or "demand" in the statute, which provides that parties to an action or proceeding, or in whose behalf an action or proceeding is prosecuted against the executor or administrator, upon a claim or demand against the estate of the deceased, does not include a claim for a family allowance.—*Estate of McCausland*, 52 Cal. 568, 577. In a statute which prohibits either party to an action from testifying against the other as to any transaction whatever with, or statement by, a deceased person, the word "transaction" means a transaction in which the decedent took part, and was a party to, and participated in.—*First Nat. Bank v. Warner (Hilli-boe)*, 17 N. D. 76, 17 Ann. Cas. 213, 114 N. W. 1085, 1086.

2. Particular matters to which statute does not apply.

(1) *In general.*—Where the action is not technically founded upon a "claim" against the estate, the plaintiff is not within the prohibition of the statute. Hence the statute does not apply to a suit, against a decedent's executor, to have an absolute conveyance to said decedent declared to operate as a mortgage, and for redemption.—*Wadleigh v. Phelps*, 149 Cal. 627, 640, 87 Pac. 93, 99. Nor does the statute prohibit the claimant of a mechanic's lien against buildings, erected by a deceased person, from being a competent witness to testify as to facts occurring before the death of the owner, in an action against the representative of his estate, as the lien is not a "claim" against the estate, within the meaning of the statute.—*Booth v. Pendola*, 88 Cal. 36, 44, 23 Pac. 200, 25 Pac. 1101. Although a witness is a party to an action against the estate of a deceased person, he may testify as to conversations not relating to matters transpiring before the death of decedent, as such evidence is not within the statutory prohibition.—*Tourtellotte v. Brown*, 18 Colo. App. 335, 71 Pac. 638, 639. When a person, sued individually for the conversion of property, undertakes to defend as administrator, he must establish, by positive averment and proof, his status as administrator, and that he is possessed of, or entitled to, such property, and chargeable therewith, in such capacity, by some appropriate preliminary trial, before the opposite parties, or other interested parties, can properly be excluded as witnesses upon the merits of the case.—*Pewitt v. Lambert*, 19 Colo. 7, 34 Pac. 684. The statutory rule that parties and persons directly interested in an action are precluded from testifying therein of their own motion, where the opposite party sues or defends as an administrator, etc., is not applicable in favor of one who is not sued as administrator, and who does not, by his answer, defend as such.—*Pewitt v. Lambert*, 19 Colo. 6, 34 Pac. 683. In a suit, brought against the successors of a deceased person, to declare a partnership in mining property, the plaintiff is entitled to testify therein, as such an action is not technically founded upon a "claim" against the estate, and the plaintiff is, therefore, not within the prohibition of the statute.—*Bernardis v. Allen*, 136 Cal. 7, 9, 68 Pac. 110. In an action against an agent, to set aside a deed made to him on the ground of the latter's fraud, the death of defendant, pending the suit, and the substitution of his administrator as defendant, does not affect the competency of plaintiff as a witness. Such an action is not a claim against the estate, but is brought to establish the fact that the land described in the complaint never became a part of his estate.—*Calmon v. Sarraille*, 142 Cal. 638, 642, 76 Pac. 486. Notwithstanding statutes like those under consideration, a foundation for the introduction of account books may be laid through the testimony of plaintiff himself. He may testify as to the correctness of books of account which have been wholly kept by him, preparatory to their introduction, in an action against an executor or administrator.—*Cowdrey v. McChesney*, 124 Cal.

363, 57 Pac. 221; *Roche v. Ware*, 71 Cal. 375, 378, 60 Am. St. Rep. 539, 12 Pac. 284. And, in such an action, the officers of a bank are competent witnesses to make preliminary proof for the purpose of admitting the books of account of the bank in evidence.—*City Sav. Bank v. Enos*, 135 Cal. 167, 172, 67 Pac. 52.

(2) **Claim in favor of estate.**—The statute which prohibits a party in whose favor an action is prosecuted against an estate from being a witness, does not apply to a person against whom an action is prosecuted by an executor or an administrator on a claim in favor of an estate.—*Sedgwick v. Sedgwick*, 52 Cal. 336. The defendant, in such a case, is a competent witness as to transactions between himself and the decedent.—*McGregor v. Donelly*, 67 Cal. 149, 7 Pac. 422. In an action upon a note, made payable to plaintiff's intestate, which was in plaintiff's possession as administratrix, and which was offered in evidence, the introduction of the note, with the indorsements of payments thereon made by decedent, is not making the decedent a witness, and the statute does not apply.—*Locke v. Klunker*, 123 Cal. 231, 239, 55 Pac. 993.

(3) **Controversies as to relative rights of heirs or devisees.**—The statute does not relate to the relative rights of the heirs or devisees as to the distribution of an estate in a proceeding by which the estate itself is, in no event, to be reduced or impaired. Hence in a controversy between living parties, where persons on the one side are the devisees or legatees under a will, and on the other, the heirs at law of the testator (the former claiming to take the estate under the will, and the latter under the statute regulating the descent of estates, and insisting that the alleged will is a nullity); where the act of the testator, in making the alleged will, is the only subject-matter of the investigation; where the estate of the testator is not interested; where the interest of those claiming succession to it, either by operation of the law, or by operation of the will, are alone involved; and where the estate remains intact and undiminished, whatever may be the result of the controversy, the subject-matter of the investigation is not a transaction with nor a statement by the decedent, and as to such investigation the parties to the suit, and those interested in the result thereof, are upon terms of equality in regard to the opportunity of giving testimony. All the parties interested are, therefore, competent to testify to any fact which is relevant and material to the issue involved.—*In re Miller's Estate*, 31 Utah 415, 88 Pac. 338, 344. A plaintiff who is suing to recover real estate claimed by her by virtue of being the wife of the decedent, where the defendants are the grandchildren and great grandchildren of decedent and who acquire their interest in the real estate through the daughter of the decedent, is not prohibited by section 320 of the Code of Civil Procedure of Kansas, from testifying to communications and transactions had personally with the decedent, as the parties adverse to her did not acquire their

title to the cause of action immediately from the decedent.—*Williams v. Campbell*, 84 Kan. 46, 113 Pac. 800.

(4) *Actions to quiet title.*—The statute does not apply to an action to quiet title. A wife, who sues the administrator of her husband's estate, is a competent witness to establish a conveyance of certain land from her husband to her, and to quiet the title. In such a case, she is not seeking to enforce a "claim" against the estate, but merely to have it declared that the estate has no interest in the property.—*Poulson v. Stanley*, 122 Cal. 655, 68 Am. St. Rep. 73, 55 Pac. 605, 606. So in an action by a husband against the administrator of his deceased wife, to quiet the title to land which was community property, the husband is a competent witness, as such an action is not on a "claim" against the estate.—*Bollinger v. Wright*, 143 Cal. 292, 76 Pac. 1108, 1110. It is concerning the property of plaintiff and to quiet a claim or demand, or title asserted by the estate to such property. The question to be determined is as to whether or not the interest held by the deceased under the deed is the property of the estate, or the property of the plaintiff. If it is not the property of the estate, then the action does not involve a demand against the estate.—*Bollinger v. Wright*, 143 Cal. 292, 296, 76 Pac. 1108. But in Washington, in a suit to quiet title, brought against a defendant, who claims title to a part of the land as heir of his deceased mother, whom plaintiff had married before he acquired the land, the plaintiff will not be permitted to testify that he was never married to her. The plaintiff is incompetent to testify to any transaction between himself and the deceased, under whom the defendant, as an adverse party, claims title.—*Nelson v. Carlson*, 48 Wash. 651, 94 Pac. 477, 478.

3. Who are competent.

(1) *In general.*—The fact that a witness is personally interested in sustaining the alleged claim of plaintiff, against the estate of decedent, does not affect his competency to testify. At most, it can be considered only in determining what weight should be given to his testimony.—*Warren v. McGill*, 103 Cal. 153, 156, 37 Pac. 144. And a witness, having been called by the adverse party and examined by him as a witness, upon certain matters pertinent to some of the issues in the case, is competent for all purposes.—*Warren v. Adams*, 19 Colo. 515, 36 Pac. 604, 606. Under the provisions of the Colorado statute, the parties to an action are competent witnesses in their own behalf, and they are thus placed on an equality. When a party sues or defends as the executor or administrator of a deceased person, the parties are placed on an equality by excluding the testimony of the adverse parties. But if the deposition of the deceased parties has been taken, "it may be read in any stage of the same action or proceeding, by either party, and shall then be deemed evidence of the party reading it." In such cases, if the deposition is read on behalf of the executor or administrator, the adverse party would be excluded from testifying in his own behalf, but for the provision of the statute which permits him to testify "as to all

matters and things which are testified to in such deposition," when such deposition has been read in evidence. This provision was enacted to meet circumstances not covered by the other provisions of the statute, and to place the parties on an equality. The equality is preserved by the restriction placed upon the testimony of the living party. The fair implication arising from this restriction is that the testimony of the living parties is to be in rebuttal of the deposition of the deceased parties; that it is optional with the executor or administrator to introduce the deposition in evidence, or to withhold it from introduction.—*Levy v. Dwight*, 12 Colo. 101, 20 Pac. 12, 14. If the testimony of a deceased party, given on a former trial, is offered in evidence by the executor or administrator of such deceased party, the reason for the exclusion of the testimony of the living party is taken away, and to bring the parties on an equality, as is the intention of the statute, the living party must be allowed to testify in his own behalf, as to the matters testified to by the deceased party on the former trial. The testimony of the deceased, given at a former trial, may be offered in evidence by the living party, and then it is to be regarded as the testimony of his own witness, and subject to all the rules applicable to the testimony of any other witnesses in his behalf; but the introduction of such testimony by the living party will not make such party a competent witness in his own behalf. The former testimony of the deceased must be voluntarily read by his representative, in order to entitle the opposite party to testify in the case.—*Levy v. Dwight*, 12 Colo. 101, 20 Pac. 12, 15. In an action against the administrator of a decedent, it is competent for the plaintiff to testify concerning communications had by him with persons representing the decedent.—*Guillaume v. Flannery*, 21 S. D. 1, 108 N. W. 255, 256. No one is disqualified as a witness by reason of his interest in the result of a litigation and the term "party" as used in section 320 of the Code of Civil Procedure of Kansas, which prohibits a party from testifying concerning personal transactions and communications with a person since deceased, does not mean or include one not technically a party to the action, however much he may be interested in the result of the action.—*Hess v. Hartwig*, 83 Kan. 592, 112 Pac. 99. Witnesses, who are not parties to a suit by a husband, as against the estate of his deceased wife, are not disqualified by the statute excluding the testimony of husband or wife for or against each other, and may still testify as to conversations held with the deceased which are otherwise admissible, but subject to the general rules of hearsay evidence.—*Truman v. Dakota Trust Co.*, 29 N. D. 456, 469, 151 N. W. 219. In replevin, brought by an administrator, where the defendant claims, in respect to part of the property, to have been joint owner with the deceased, and that his son, not a party to the action, is the owner of the other part, the son is not a person so directly interested as to be incompetent to testify.—*Popejoy v. Bahr* (Colo.), 176 Pac. 947. A witness incompetent under a statute not permitting him to testify concerning a trans-

action or communication had with a deceased person, may testify to the details of a conversation had by him with another witness who, in behalf of the personal representative of the deceased person, has testified to the conversation, although in that conversation the incompetent witness detailed a transaction had by him personally with the deceased.—*Wallace v. Wallace*, 101 Kan. 32, 36, 165 Pac. 838, 840.

(2) **Parties not interested.**—The obvious meaning of the provision in the California statute, that "parties to an action or proceeding against the estate shall not testify" is, that a party to the action shall not testify against the executor or administrator. It could not have been the intention of the legislature to render incompetent as a witness, in such cases, the executor or administrator, who is charged with the duty of protecting the estate against improper or unjust demands, as, in many cases, it would tie his hands, and operate to prevent his giving efficient protection, and compel him to stand by with lips sealed, and see the estate despoiled, when, if permitted to speak, the fraudulent or unjust character of the claim would be exposed and defeated. The manifest intent and purpose of the statute is, that it is only parties who assert "claims" against an estate who are rendered incompetent to testify, and the word "parties" does not refer to the executor or administrator, who is the party defendant.—*Todd v. Martin*, 4 Cal. Unrep. 805, 37 Pac. 872, 874. The California statute providing that parties or persons in whose behalf an action is prosecuted against an executor or administrator, on a claim against a deceased person's estate, can not be a witness to any fact occurring before the death of such person, neither disqualifies parties to a contract, nor persons in interest, but only parties to the action. It does not disqualify one who is neither a party nor a person in whose behalf the action is prosecuted, although he may have an interest in the outcome of the litigation.—*Merriman v. Wickersham*, 141 Cal. 567, 572, 75 Pac. 180. A person who is sued, with other defendants, by the administrator of the estate of a decedent, as a defendant in the action, wherein it is alleged, by the plaintiff, that a person testifying had assigned to the deceased person his right, title, and interest in and to the claims and property in controversy, and where the witness comes into the action, and disclaims any interest therein, he is not disqualified to testify in the cause on behalf of the remaining defendants, he having, at the time, no interest in the controversy.—*Murphy v. Colton*, 4 Okla. 181, 44 Pac. 208. Persons having no interest in the litigation, as parties thereto, or otherwise, are not rendered incompetent to testify when the other party to the transaction is dead. Were such a construction of the statute to prevail, the doors of the courts would practically be closed against all persons having any character of action arising upon any transaction, when the other party to the transaction is dead.—*Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025, 1026. It is only persons interested, as parties to the action, who are excluded by the statute.—*Carr v. Jones*, 29 Wash. 78, 69 Pac. 646, 647. Under the stat-

ute of Arizona, which permits parties to be witnesses under all conditions and circumstances, with but few exceptions, and which does not, in terms, prohibit the husband or wife of a party to the action from testifying as to any conversation which he or she may have had with the deceased during his lifetime, a grantee's husband may, in an action by the grantee against the grantor's administrator, to have the deed corrected, testify as to statements made to him by the grantor concerning a mistake in the deed, and as to the land intended to be conveyed thereby.—*Miller v. Miller*, 7 Ariz. 316, 64 Pac. 415, 416. Even an heir or distributee of an estate, who is not a party to the record, nor directly interested in the result of the action, although the result of a judgment against the defendant would be to decrease the amount of his estate, is not disqualified as a witness for the executor or administrator.—*McCoy v. Ayres*, 2 Wash. Ter. 307, 5 Pac. 843.

(3) **Party may testify to what in general.**—The Kansas statute does not prohibit a party to an action, pending between himself and the executor of the estate of a deceased person, from testifying as to any matter relevant to the issues therein, except as to transactions or communications had personally with the deceased.—*Park v. Ensign*, 10 Kan. App. 173, 63 Pac. 280. Nor is he necessarily incompetent to testify as to transactions between the deceased and his co-defendant in which he took no part.—*Eddy v. Obrien*, 9 Kan. App. 882, 57 Pac. 244, 245. A daughter, or other party prosecuting a claim against the estate of a deceased person, is competent to testify to conversations had between the deceased and a third person, in the presence and hearing of the witness.—*Griffith v. Robertson*, 73 Kan. 666, 85 Pac. 748. A party to an action may testify in respect to transactions or communications had by him with a deceased person, where the adverse party is not the executor, administrator, heir at law, next of kin, surviving partner, or assignee of such deceased person, and where the title to the cause of action was not acquired immediately from him.—*Reville v. Dubach*, 60 Kan. 572, 57 Pac. 522. Where one of the parties to an action is an heir of the deceased person, who claims that the title to the land in controversy was transferred to his ancestor by the adverse party, such adverse party may testify that he had no transactions personally with the deceased, and that no transfer of title was ever made by him to the deceased.—*Murphy v. Hindman*, 58 Kan. 184, 48 Pac. 850. A party to an action is not prohibited from testifying in his own behalf to a personal transaction—in this case, payment—had with a deceased administrator, as against the successor of such deceased administrator, who sues to recover, as part of the assets of the estate of the intestate, the claim which the party testifies he paid to the deceased administrator as administrator of the estate of such intestate.—*St. John v. Lofland*, 5 N. D. 140, 64 N. W. 930. The statute of Washington provides that, "in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person," etc., "a party in interest or to the record shall not be

permitted to testify in his own behalf as to any transaction had by him with, or any statement made to him by, any such deceased or insane person," etc. This statute does not prohibit the beneficiary of a benefit certificate, suing for the benefit, from testifying as to transactions with the deceased insured, tending to prove the truth of written statements of the deceased to the insurer. The defendant, in such a case, is not defending the action as executor or administrator, or legal representative of the insured, or as deriving its title from the insured, but is defending upon the theory that the representations made by the insured were false, and that thereby a fraud was perpetrated upon the company. Such a case does not fall within the ban of the statute.—*Erickson v. Modern Woodmen, etc.*, 43 Wash. 242, 86 Pac. 584, 585. In an action, under such statute, against a widow, as administratrix of her deceased husband, on a note indorsed by him, the plaintiff may testify that defendant was not present at the time the notes in suit were indorsed, but he is incompetent to testify as to transactions had by him with the decedent, or as to statements made to him by decedent, and can not testify as to whether the notes had been changed since he received them from the deceased, as this would be an indirect way of asking what their condition was when received from the hands of the deceased, and is a palpable attempt to evade the statute.—*O'Connor v. Slatter*, 48 Wash. 493, 93 Pac. 1078, 1079. The statutory rule prohibiting a claimant from testifying concerning transactions had by him with, or statements made to him by, a deceased person is not violated where the witness does not say anything at all about conversations and transactions between himself and the decedent, and he may properly testify as to his relations with property belonging to decedent, and for the handling of which he was to receive a specified compensation for his services.—*Marvin v. Yates*, 26 Wash. 50, 66 Pac. 131, 132, 133. In a suit to recover a portion of a mining claim, brought by the grantor's administrator, on the ground that the deed under which defendants claim is "so indefinite as to make the deed inoperative," and where the defendants are merely protecting themselves against the claims and demands of plaintiff, they are not seeking to enforce any "claim" or "demand" against the estate, and they are therefore competent witnesses to testify as to any matters of fact occurring before the death of the grantor.—*Collins v. McKay*, 36 Mont. 123, 122 Am. St. Rep. 334, 92 Pac. 295, 297. A person, though he is a party to an action, may testify to conversations which occurred in his presence between deceased persons, where the opposite party claims as heir of one of the deceased persons.—*Page v. Sawyer*, 101 Kan. 612, 168 Pac. 878. The wife of a person incompetent to testify under a statute not permitting a witness to testify concerning a transaction or communication had with a deceased person, may testify to a conversation between her husband and the deceased person but in which she took no part.—*Wallace v. Wallace*, 101 Kan. 32, 36, 165 Pac. 838, 840.

(4) **Party may testify to what in particular.**—The Colorado statute provides, that "in any action, suit, or proceeding, by or against any surviving partner or partners, joint contractor or contractors, no adverse party or person adversely interested in the event thereof shall be rendered a competent witness to testify to any admission or conversation by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation." This statute clearly indicates that, where the suit is brought against any surviving partner or joint contractor, the testimony relative to any admission or conversation by the deceased person or joint contractor shall not be admitted, unless some one or more of the surviving partners or joint contractors were present at the time of the admission or conversation. Hence, if one is defending an action in the double capacity of surviving partner and as trustee of the heirs at law, the testimony of the plaintiff as to a conversation had with a deceased partner, in the presence of a surviving partner, is admissible.—*Savard v. Herbert*, 1 Colo. App. 445, 29 Pac. 460, 462. The inhibition of the Colorado statute as to a person testifying in his own behalf, in a case where an adverse defendant is an heir of a deceased person, does not extend to books of account between a party to a proceeding and such deceased person. Hence in a suit for an accounting between heirs and devisees, where it appears that one of them loaned money for the decedent before his death, his account book showing the repayment of a loan is admissible in evidence on proper preliminary proof.—*Haines v. Christle*, 28 Colo. 502, 66 Pac. 883, 887. In an action against the administrator, on a claim against the estate, plaintiff's wife is a competent witness; but where a deposition taken by the administrator is introduced in evidence and read by the claimant, and there is attached to such deposition as an exhibit a letter written by the claimant to the deponent after the death of decedent, in which claimant set forth, in detail, the amount and character of the services rendered by him to the decedent, upon which services his claim against the estate was based, an objection to the introduction of such exhibit should be sustained. The claimant being disqualified as a witness, by virtue of the statute, no self-serving statement made by him in the form of a letter could be competent evidence.—*Butler v. Phillips*, 38 Colo. 378, 12 Ann. Cas. 204, 88 Pac. 480, 484. In an action for an accounting between cotenants of the rents and profits of a quarry in which defendant holds title as devisee, it is competent for plaintiff to testify as to the existence of a partnership between himself and the deceased devisor, as well as to the terms of the partnership agreement.—*Flynn v. Seale*, 2 Cal. App. 665, 84 Pac. 263. In an action to foreclose a deed given as security for debt, wherein the grantee, witness, and the heirs at law of the grantor, since deceased, are adverse parties, testimony of the grantee that he had paid interest on a prior mortgage, and taxes on the mortgaged premises, to protect the lien of his deed,

does not come within the statute disqualifying a party to an action from testifying to transactions had with a person since deceased.—*Omlie v. O'Toole*, 16 N. D. 126, 112 N. W. 677. In an action by an administrator of the estate of a deceased person, the defendants, if otherwise qualified, may testify as to the mental capacity of the deceased at the time the contract is claimed to have been made.—*Grimshaw v. Kent*, 67 Kan. 463, 73 Pac. 92. In an action against an executor or administrator, on a note executed by his decedent, plaintiff's testimony that, of his own knowledge, decedent had made payments preventing the bar of limitations, is not inadmissible, where it does not appear affirmatively that the knowledge of the witness had come to him through any transaction or communication had by him personally with the decedent.—*Crebbin v. Jarvis*, 64 Kan. 858, 67 Pac. 531, 532. An attorney at law, who brings suit against an executor or administrator for professional services rendered to the deceased person, may testify as to incidental matters respecting his practice and income, especially where such matters can not be said to have occurred before the death of deceased; and he is not precluded, by his incompetency as a witness, from reading to the jury, during his argument, the claim and verification thereof attached to the complaint and made a part thereof.—*Knight v. Russ*, 77 Cal. 410, 414, 19 Pac. 698. The statute is not violated by questions asked of a witness which do not relate to anything that occurred before the death of the deceased. Hence he may testify as to payments made after the death of decedent.—*Cowdrey v. McChesney*, 124 Cal. 363, 57 Pac. 221, 228. If a contractor, and the executors and heirs of the deceased owner of a building, erected under a contract between said contractor and the owner, are parties defendant in an action to foreclose a subcontractor's lien, the contractor's evidence as to when the building was completed, is not objectionable as referring to a "transaction" with a party since deceased.—*First Nat. Bank v. Warner (Hilliboe)*, 17 N. D. 76, 17 Ann. Cas. 213, 114 N. W. 1085, 1086. In an action by an administrator to recover money loaned to the defendant by the decedent, there was testimony by the defendant to the effect that money for the payment of the debt was enclosed in an envelope and taken to the post-office, and that certain steps were there taken to have the postmaster register the letter and send it to the decedent in a distant state and also that in due time he received a writing acknowledging the receipt of the money, and this was identified and introduced in evidence. Held that the admission of the testimony did not violate the limitation prescribed in section 320 of the Code of Civil Procedure of Kansas, which prohibits a party in a case like this from testifying to a communication or transaction had personally with the decedent.—*Bryan v. Palmer*, 83 Kan. 298, 21 Ann. Cas. 1214, 111 Pac. 443. In a suit by an administratrix to cancel a conveyance made by deceased, where defendant pleaded affirmatively that such conveyance was made pursuant to a trust resulting from his having originally paid the purchase price of the prop-

erty, the husband and daughters of deceased are not disqualified under section 1211, Rem. Code, 1915, from testifying that the consideration for the property was not furnished by the defendant, such testimony not being adverse to the deceased.—*Brucker, v. De Hart*, 106 Wash. 386, 180 Pac. 397, 399. As a wife may give testimony for the purpose of establishing the claim of her husband against an estate there is no reason why she may not testify in his behalf for the purpose of establishing his claim as a legatee or devisee under a will.—*In re Hatfield's Will*, 21 Colo. App. 443, 122 Pac. 64.

(5) *Employees, clerks, agents, etc.*—The Kansas statute, which provides that "no party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person," does not apply to an agent of a party to the action, such agent not being a party to the action, nor having any legal interest in the result of it.—*Carroll v. Chipman*, 8 Kan. App. 820, 57 Pac. 979. The California statute disqualifies only "parties or assignors of parties." It does not apply to persons who are merely employed by such parties or assignors of parties. Hence, in an action against an administrator, the books of account of a bank are admissible in evidence, in a proper case, and the officers of the bank are competent to make preliminary proof of such books.—*City Sav. Bank v. Enos*, 135 Cal. 167, 172, 67 Pac. 52. The deposition of plaintiff's agent, in an action of replevin against a sheriff's executor, is competent and admissible to show title in plaintiff, where he has no direct interest in the event of the action.—*King Shoe Co. v. Chittenden*, 16 Colo. App. 441, 66 Pac. 173, 174. The statute excludes only the testimony of a party to the action. It does not exclude the testimony of the agent of the party or person whose testimony is excluded. The agent of such party is a competent witness to prove the whole cause of action, or the defense, although the opposite party derived his interest in the subject-matter of the controversy, through a deceased party. Hence in an action to foreclose a subcontractor's lien, where a bank is plaintiff, and the executors and heirs at law of the deceased owner of the building, erected under a contract between the contractor and the owner, are made parties defendant, the cashier of the plaintiff bank is a competent witness to give testimony as to the mailing of a notice to the deceased, that the plaintiff had furnished to the contractor the materials for which a lien is claimed, even if it be conceded that the mailing of such a notice was "a transaction with the deceased," which is not decided.—*First Nat. Bank v. Warner (Hilliboe)*, 17 N. D. 76, 17 Ann. Cas. 213, 114 N. W. 1085, 1086. A conversation in respect to the subject-matter of the suit, had with a deceased person by an agent and manager of the plaintiff, is not incompetent, where such agent is not a party to the action or in any way interested in the litigation, and is not disqualified as a witness.—*First Nat. Bank v. Davidson-Case L. Co.*, 52 Okla. 695, 153 Pac. 836.

REFERENCES.

Effect of statute, relating to the competency of a party to testify in regard to transactions or communications with a deceased person, on the admissibility of his testimony as to transactions with the attorney or agent of such person.—See note, 7 L. R. A. (N. S.) 684-686.

(6) **Officers and stockholders of corporations.**—The Kansas statute, which prohibits a party from testifying in his own behalf in respect to any transaction or communication had personally with a deceased person, etc., does not exclude the officers of a corporation which may be a party, or other interested persons not parties to the action.—*Mendenhall v. School District*, 76 Kan. 173, 90 Pac. 773. The California statute, which prohibits parties to an action against an executor or administrator, upon a claim or demand against the estate of a deceased person, from being a witness as to any matter of fact occurring before the death of such deceased person, does not disqualify all persons who are officers or stockholders of the corporation from testifying.—*City Sav. Bank v. Enos*, 135 Cal. 167, 172, 67 Pac. 52. A stockholder and officer of a corporation may testify as to any fact occurring before the death of such person, in an action by the corporation, or its assignee, against an executor or administrator.—*Merriman v. Wickersham*, 141 Cal. 567, 75 Pac. 180. So under a statute which precludes a party in interest, or to the record, from testifying as to any transaction had by him with, or any statement made to him by, a deceased person, when the adverse party sues or defends as executor or administrator, or as legal representative of such deceased person, stockholders or directors in a bank are not, in an action to recover the amount of a note given by another stockholder, parties in interest, if they have no interest in the controversy. They are therefore competent witnesses to explain the terms of a note in writing, as to the intention of the parties when it was made, where the language is such as to render its meaning doubtful, and resort must be had to other testimony in order to ascertain the meaning and intent of the parties by the language used.—*Carr v. Jones*, 29 Wash. 78, 69 Pac. 646. The cashier of a national bank, which is a party to an action, is a competent witness to testify to the fact of the mailing of a notice to a deceased person, whose executors and heirs at law are parties to the action, where the statute prohibits the evidence of parties only in such cases.—*First Nat. Bank v. Warner (Hilliboe)*, 17 N. D. 76, 17 Ann. Cas. 213, 114 N. W. 1085, 1086.

(7) **Widow of deceased.**—In an action by a widow against the administrator of her deceased husband's estate, to establish a conveyance of certain land from her husband to her, and to quiet the title, the plaintiff is a competent witness as to a matter of fact occurring before the death of the decedent.—*Poulson v. Stanley*, 122 Cal. 655, 68 Am. St. Rep. 73, 55 Pac. 605, 606. And in an action against the administrator on a note, the wife of the deceased maker of the note is competent to testify as to the payment, before decedent's death, of a sum

indorsed on such note as paid. She is not an adverse party, in any sense, nor can it be said that she is disqualified by reason of interest, assuming that interest works a disqualification.—*Stewart v. Dudd*, 7 Mont. 573, 19 Pac. 221, 224. The statute of Washington does not prohibit a witness who is an interested party from testifying in favor of the estate of a deceased person. Hence in an action against a widow, as administrator of her deceased husband's estate, on a note indorsed by him, she is a competent witness to testify as to what took place between her deceased husband and plaintiff, in her presence, at the time such indorsement was made.—*O'Connor v. Slatter*, 46 Wash. 308, 89 Pac. 885, 886. A widow is a competent witness as to transactions with her deceased husband, where she is not a party to the action, and can not be bound by any judgment therein.—*Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819, 827. A widow is not disqualified from testifying after she has filed a disclaimer as she is then no longer a party to the action and a defendant can not disqualify her by an averment in a crosscomplaint that she claimed an interest in the property.—*Denny v. Schwabacher*, 54 Wash. 689, 132 Am. St. Rep. 1140, 104 Pac. 139. In an action brought by an administrator, the widow and stepdaughter of the deceased, neither being a party to the action, are competent witnesses to testify as to transactions and conversations had personally by the defendant with the deceased; nor can it be held that they are incompetent, under the statute, on the ground of interest they may have in the result of the action.—*Alexander v. Bobier* (Okla.), 166 Pac. 716.

(8) Competency in other particular instances. In general.—Where the defendant, in an action in ejectment, claims through an executor's sale of a deceased person's real estate, he is not the assignee of such deceased person, within the statute, and the plaintiffs, although they claim title immediately from such deceased person, are not incompetent, under the provisions of the statute, to testify to transactions or conversations had with the deceased concerning the subject-matter of the action.—*Powers v. Scharling*, 71 Kan. 716, 81 Pac. 479. The plaintiff is not precluded from testifying, as a witness on his own behalf, where the action is not one prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person.—*Cunningham v. Stoner*, 10 Ida. 549, 79 Pac. 228. In a suit by the divorced wife of a grantor, claiming the property conveyed in her own right, a grantee of the deceased grantor is competent to testify to conversations with the latter. In such a case, the adverse party, the plaintiff, is not suing as "executor, administrator, heir, legatee, or devisee of the deceased," nor as "guardian, assignee, or grantee, directly or remotely, of such heir, legatee, or devisee."—*Murphy v. Ganey*, 23 Utah 633, 66 Pac. 190, 193. A husband is a competent witness in an action by him, against the administrator of his deceased wife, to quiet the title to the land which was community property. The controversy, in such a case, is not one concerning a

"claim" or "demand" against the estate of the deceased. It is concerning the property of the plaintiff, and to quiet a claim, or demand, or title asserted by the estate to such property. The question to be determined is as to whether or not the interest held by deceased, under the deed, is the property of the estate, or the property of plaintiff. If it is not the property of the estate, then the action does not involve a claim or demand against the estate.—*Bollinger v. Wright*, 143 Cal. 292, 76 Pac. 1108, 1110. In a street-car accident, in which both husband and wife were injured, and where the husband, within a few months afterwards, died, and where the motorman of the street car which struck the plaintiff was not made a party in an action by the plaintiff to recover for personal injuries, and, as executrix of her husband's estate, for injuries sustained to the community by reason of such accident, he may testify as to conversations had with the husband before his death. In such a case, he is not a "party in interest, or to the record" who is admitted "to testify in his own behalf" within the meaning of the statute. He is in no sense a party, and can not be bound by the result of the suit.—*O'Toole v. Faulkner*, 34 Wash. 371, 75 Pac. 975, 977. In an action to foreclose a subcontractor's lien, where the executors and heirs at law of the deceased owner of the building, erected under a contract between the contractor and the owner, are made parties defendant, the contractor may testify as to when the building was completed, without violating the rule which prohibits a party from testifying as to transactions with a party since deceased; but he is not a competent witness as to payments made on the contract.—*First Nat. Bank v. Warner (Hillboe)*, 17 N. D. 76, 17 Ann. Cas. 213, 114 N. W. 1085, 1087. In a trial, bearing upon the rights of parties to claim as heirs of a deceased person, a witness may testify as to declarations made in his presence by the deceased, that a person named was a son of his mother's sister.—*In re Colbert's Estate*, State v. Bush, 51 Mont. 455, 153 Pac. 1022. In an action to determine the ownership of the residue of property left after paying the debts of a deceased person, which action is prosecuted by one to whom the deceased person had contracted to leave the property at his death, against the beneficiary under a will executed by the deceased person, the plaintiff's husband, who is not a party to the action, is a competent witness by whom to prove the contract between the plaintiff and the deceased person, although the plaintiff and her husband may be occupying a part of the land in controversy as a homestead.—*Harris v. Morrison*, 100 Kan. 157, 163 Pac. 1062. A wife is an incompetent witness to testify in relation to transactions with her deceased husband concerning the subject-matter of a suit brought by him against her, and continued by his executor after the husband's death; but her son by a former husband, is not, during her life, an incompetent witness, where he has no present or vested interest in the subject-matter of the suit; under the statute of South Dakota, a party is not an incompetent witness unless he has such an interest, and the interest

of prospective heirs is too remote to render them incompetent to testify as to transactions with incompetent persons from whom they would naturally inherit.—*Evans v. Hellman*, 37 S. D. 499, 504, 159 N. W. 55.

(9) *Same*. *Probate and contest of will*.—Where the devisee under a will offers it for probate, and calls a witness who testifies to a statement made by the testator, in the proponent's presence, of an estrangement between the testator and the latter's two brothers, such two brothers are competent witnesses, under the Colorado statute, as amended in 1907, to deny the estrangement.—*James v. James* (Colo.), 170 Pac. 285. The South Dakota statute does not disqualify heirs from being witnesses on the contest of the probate of a will; and the family physician of the testator may testify, under that statute, as to the testator's physical appearance, actions, and statements at about the time of the execution of his will.—*In re Golder's Estate*, *Johnson v. Shaver*, 37 S. D. 397, 399, 158 N. W. 734, 735. In a suit attacking a will, testimony of a devisee that he had no communication with testatrix is not rendered inadmissible by a statute which forbids testimony by a devisee in his own behalf in regard to a communication had with testatrix.—*Gaston v. Gaston*, 83 Kan. 215, 109 Pac. 777.

(10) *Same*. *Promissory notes, mortgages, and foreclosure*.—The testimony of the maker of a note, not made a party to the suit thereon, that he was the principal, and the defendant a surety, and that the deceased payee had, for a valuable consideration, and without the knowledge of the surety, extended the time of the payment thereof, is not within the prohibition of the statute forbidding a party to testify, in his own behalf, in respect to transactions personally had with a deceased person.—*Coger v. Armstrong*, 72 Kan. 691, 83 Pac. 1029. In an action on a note, by an indorsee of a firm, against a co-payee and indorser of the note, upon the latter's liability as an indorser, and where one of the members of the firm, who was also a payee and indorser of the note, is dead, the defendant is a competent witness to testify to facts which occurred before decedent's death.—*McPherson v. Weston*, 85 Cal. 90, 97, 24 Pac. 733. In an action on a promissory note, where the question was whether certain payments were made on the note and not credited, the defendant was asked when he made the first payment on the note. Held: that the question did not call for a self-serving declaration, but for a fact, the answer to which was no less admissible because the payee of the note had since deceased, and is not objectionable on the ground that it is testimony as to a transaction with a deceased person within the meaning of the inhibitions contained in sections 1850 to 1853 and 1870, Code of Civil Procedure.—*Bailey v. Moshier*, 35 Cal. App. 345, 348, 169 Pac. 913. Where, in an action on a promissory note, the question was whether the amount of a certain check should have been credited thereon, and plaintiff had given testimony from which the fair inference might be drawn that no such payment had been made, it was proper on cross-

examination to ask the witness from whom he received the check, the obvious purpose being to show that the check was intended as a payment on the note, even though witness received the check before he became the owner of the note, and even though he received the check from a person since deceased.—*Bailey v. Moshier*, 35 Cal. App. 345, 347, 169 Pac. 913. In an action upon a promissory note in the hands of an assignee of the distributee of the payee's estate, testimony of the defendant as to payments made during the lifetime of the payee is not objectionable under subd. 3, section 1880, Code of Civil Procedure, since the claim or demand sued on is not a claim or demand against the estate of the deceased payee, and does not relate to any such claim or demand.—*Bailey v. Moshier*, 35 Cal. App. 345, 348, 169 Pac. 913. Where defendant, in an action on a promissory note in the hands of an assignee of the distributee of the payee's estate, had testified that the payments made by him to the payee in the latter's lifetime, were payments on the note sued on, and that the note represented the only indebtedness from him to deceased, it was proper to ask plaintiff in rebuttal whether defendant had received any cash money from the deceased in his lifetime, as a loan, which was not evidenced by the note sued on.—*Bailey v. Moshier*, 35 Cal. App. 345, 349, 169 Pac. 913. Defendant in an action on a promissory note in the hands of an assignee of the distributee of the payee's estate, was properly allowed to explain the recitals of a receipt given him by such payee, where such receipt was not understandable without explanation.—*Bailey v. Moshier*, 35 Cal. App. 345, 349, 169 Pac. 913. Where a mortgagor is alive and able to testify, and there is no presumption that a decedent, if alive, would have any knowledge of the fact, the plaintiff, in an action to foreclose a note and mortgage, is not disqualified as a witness, under the Colorado statute, to testify as to the execution and delivery of such mortgage, by the fact that a purchase money note for the property mortgage executed subsequently had passed into the hands of the decedent, and his administrator was a party defendant in the foreclosure suit.—*Nesbitt v. Swallow* (Colo.), 164 Pac. 1163. Where a note and mortgage were obtained by the fraud of the plaintiff in an action to foreclose the mortgage, and of such plaintiff's associate, since dead, the defendant is competent, in an action to foreclose the mortgage, to testify as to transactions had by him with such associate.—*Willcox v. Schissler*, 55 Mont. 246, 175 Pac. 889.

4. Sufficiency of evidence.—The declaration or admission against interest, of a person since deceased, deliberately and understandingly made, and definitely identified by the party deposing to it, is evidence sufficient of itself, in an action against his administrator upon an account against the deceased, to make out a prima facie case; additional proof is not necessary; but, on the other hand, added weight should be given such evidence when it is aided by the testimony of witnesses having knowledge of the facts.—*Roy v. King's Estate*, 55

Mont. 567, 179 Pac. 821. Evidence, in an action against an administrator for supplies furnished to, and services performed for, the deceased, sufficient to make out a *prima facie* case.—*Roy v. King's Estate*, 55 Mont. 567, 179 Pac. 821. Sufficiency of evidence, in an action against a decedent's estate to recover amounts advanced on account of a corporation, to justify a finding that the plaintiff and the deceased, while directors and stockholders of the company, before the disbursements of any funds, entered into an oral agreement between themselves that they would finance the company and personally advance funds to meet its obligations; and that in the event of either of said parties failing to obtain reimbursement from the company, there was to be an accounting had between the parties, each promising to pay one-half of the sums so advanced and unpaid.—*Bennighoff v. Robbins*, 54 Mont. 66, 166 Pac. 687.

5. Who are incompetent.

(1) *In general.*—To render a witness incompetent, under the California statute, it must not only appear that the witness is a party to the action, and that the action is against the executor or administrator of a decedent, but it must also appear that the action is upon a claim or demand against the estate of the decedent, and that the testimony sought from the witness is as to a matter of fact occurring before the death of the decedent. Unless all of the conditions exist, the witness can not be held incompetent.—*Poulson v. Stanley*, 122 Cal. 655, 658, 68 Am. St. Rep. 73, 55 Pac. 605; a case showing the changes made in the California law. In a joint action, for the value of services rendered by the plaintiff, and by his assignor, upon a demand against the representatives of a decedent and a co-defendant, the plaintiff's assignor, though not a competent witness, against such representatives, to prove his employment by the decedent, is competent to testify against the co-defendant, against whom a several judgment might be rendered.—*Shain v. Forbes*, 82 Cal. 577, 583, 23 Pac. 198. An estoppel can not be proved in violation of the statute relative to transactions with deceased persons.—*Frazier v. Murphy*, 133 Cal. 91, 97, 98, 65 Pac. 326. In an action by an administrator, one who has, by service of summons by publication, been made a party to the action, can not testify in favor of his co-defendant as to any transaction between himself and the deceased, although he did not appear in the action, and filed no answer therein.—*Bunker v. Taylor*, 13 S. D. 433, 83 N. W. 555, 558, 559. The contractor of a building, pursuant to a contract with the owner of the building, is not a competent witness as to payments made on said contract, where the owner of the building has since died, and his executors and heirs at law are made parties defendant with said contractor, in an action by the plaintiff to foreclose his lien as a subcontractor.—*First Nat. Bank v. Warner (Hillboe)*, 17 N. D. 76, 17 Ann. Cas. 213, 114 N. W. 1085, 1087. Under the statute of Wyoming, the petitioner, in a proceeding against heirs of a deceased

person to establish the heirship of petitioner as widow of the deceased, is incompetent to prove her marriage. If no objection is made to her testimony, the evidence, in the absence of such objection, is competent, although the witness is not. But as the statute makes her an incompetent witness, that fact should be considered in determining the weight to be given to her testimony.—*Weidenhofs v. Primm*, 16 Wyo. 340, 94 Pac. 453, 458. A witness is incompetent on the ground of interest in certain exceptional cases, but these do not include the case of a witness whose only interest is that of a holder of shares of stock in a corporation that is a party to the action, the other party or parties being the representative or representatives of a deceased person.—*Beaston v. Portland Payette T. & M. Co.*, 89 Wash. 627, Ann. Cas. 1917B, 488, 155 Pac. 162. Where a person claims an interest in property held by the defendant as administrator, the claimant will not be allowed to prove his interest by testifying to conversations had by the decedent with third parties, but in the claimant's presence and hearing; the statute renders such testimony inadmissible.—*Nicholson v. Kilbury*, 80 Wash. 501, 505, 141 Pac. 1043. In an action by a woman against the administrator of the estate of her deceased husband, she is an incompetent witness to testify, concerning the cause of action, where it appears that she acquired such cause of action through a transaction directly with her deceased husband.—*Vance v. Whitten*, 51 Okla. 1, 151 Pac. 567. A woman who commences a proceeding to establish her marriage with a decedent is incompetent to testify as to such marriage, or to any other transaction with the deceased under the statute of Washington.—*Weatherall v. Weatherall*, 56 Wash. 344, 105 Pac. 825. An assignor of a thing in action is not allowed to testify in behalf of either party where one of the parties claims to have acquired title directly or indirectly from a deceased person.—*Gilmore v. Hoskinson*, 98 Kan. 86, 157 Pac. 426. A witness, incompetent under a statute not permitting a person to testify concerning a transaction or communication had with a deceased person, may testify to all matters in controversy which did not concern any transaction or communication had personally by the witness with the deceased person.—*Wallace v. Wallace*, 101 Kan. 32, 35, 165 Pac. 838, 840. An objection to the incompetency of a witness must go to the competency of such witness and is insufficient to raise the question of the competency of the testimony.—*Butler v. Wilson*, 54 Okla. 229, 153 Pac. 823, 824.

(2) *Executor or administrator.*—Under the Oklahoma statute, it is error to permit a defendant in a civil action to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person, where the plaintiff is the administrator of the estate of such deceased person and acquired title to the cause of action immediately from him.—*Lindsey v. Goodman*, 57 Okla. 408, 157 Pac. 344. An executor is clearly an "adverse party" within the rule fixed by statute, excluding the testimony of a party in interest as to transactions with a party since deceased where the

adverse party sues or defends as executor, etc., in a proceeding to compel the executor to inventory certain property as community property in order to satisfy community debts.—*In re Cunningham's Estate*, 94 Wash. 191, 192, 161 Pac. 1193.

(3) **Purpose of statute and duty of court.**—The purpose of the rule stated in section 1880 of the Code of Civil Procedure of California, is to prevent a plaintiff, in an action to recover upon a claim against the estate of a deceased person, from giving testimony which would in itself tend to establish the plaintiff's claim or demand.—*Colburn v. Parrett*, 27 Cal. App. 541, 150 Pac. 786. The evident purpose of the statute is to prevent those whom it covers from testifying to any transaction with the deceased which it would be to the interest of the deceased, if living, to deny, death having closed the lips of one party, the law closes the lips of the other; but only the lips of those whose testimony is adverse to the estate of the deceased person are closed.—*In re Cunningham's Estate*, 94 Wash. 191, 193, 161 Pac. 1193. The interpretation of statutes of this character should not be extended beyond their language when the effect of such extension will be to add to the list of those rendered incompetent as witnesses.—*St. John v. Lofland*, 5 N. D. 140, 144, 64 N. W. 930. The court should prohibit a witness from giving testimony as to transactions with a decedent, which testimony violates the statute as to the matter.—*Williams v. Clark* — (N. D.) —, 172 N. W. 825. In determining the propriety of admitting the testimony of a witness as to transactions between himself and a deceased person, the following elements must concur and be apparent: first, the witness must belong to a class which the statute renders incompetent; second, the party against whom the testimony is to be offered must belong to a class protected by statute; and third, the testimony itself must be of a nature forbidden by statute.—*Forsyth v. Heward*, 41 Nev. 305, 309, 170 Pac. 21.

(4) **Parties can not testify to what in general.**—Where the party on one side of a controversy is the executor, administrator, heir at law, or next of kin of the deceased person, and has acquired title to the cause of action directly through said deceased person, the adverse party is incompetent to testify to any transaction or communication had with such deceased person.—*Roach v. Roach*, 69 Kan. 522, 77 Pac. 108. Where the adverse party is defending as deriving title through a decedent, the plaintiff is not a competent witness to testify, in his own behalf, to any transaction between himself and the decedent.—*Preston v. Hill-Wilson Shingle Co.*, 50 Wash. 377, 97 Pac. 293, 294. Under the statute of Washington, which provides that a party in interest, or to the record, shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him by, a deceased person, in an action against parties deriving title through such deceased person, the plaintiff, in an action to recover certain land, where defendants claim as representatives of the plaintiff's

deceased father, and who derived title to the land through the executor of the father's will, is not a competent witness to explain the conditions of the bond for title, and other writings, between himself and his father.—*Reynolds v. Reynolds*, 42 Wash. 107, 84 Pac. 579, 581. So where the statute provides that, in an action where a party sues as deriving title from a deceased person, the adverse party shall not be permitted to testify as to any transaction had with the decedent, a self-serving affidavit filed in the county auditor's office, stating in substance, that the real estate left by decedent had been purchased with partnership funds, and that it was the joint property of affiant and decedent, is not admissible as evidence in favor of the affiant, in a suit brought by a claimant under the decedent's will, to remove the cloud on title caused by such affidavit.—*Samuel, etc., Kenney Presb. Home v. Kennedy*, 45 Wash. 106, 88 Pac. 108, 109, 110. In ejectment, the plaintiff's testimony that he had purchased the land from defendant's decedent, and detailing other particulars of the transaction, must be excluded, although the evidence detailing the transaction with the deceased was first brought out in cross-examination.—*Kline v. Stein*, 30 Wash. 189, 70 Pac. 235, 236. Where the plaintiff claims by, through, or from a deceased person, the declarations of said deceased person to either party to the record, in a controversy over the title to land, can not be testified to by either of them.—*Smith v. Taylor*, 2 Wash. 422, 27 Pac. 812, 813; showing change of the statute. Under the statute of Utah, a party to an action to establish his interest in the estate of a deceased person can not testify, in his own behalf, to any conversation or transaction equally within his own knowledge and the knowledge of the person since deceased, when the opposite party sues or defends as the heir of such deceased person.—*Hennefer v. Hays*, 14 Utah 324, 47 Pac. 90. As the plaintiff, under the California statute, is incompetent to testify against an administrator upon a claim or demand against the estate of a deceased person as to any fact occurring prior to the death of such person, he is also incompetent to contradict the evidence of a witness as to admissions made by such witness prior to decedent's death, and which tend to prove, or to disprove, the facts in issue.—*Stuart v. Lord*, 138 Cal. 672, 676, 678, 72 Pac. 142. A party to an action is prohibited from testifying to a conversation with plaintiff's intestate, notwithstanding the fact that an agent of the decedent was present at the time the conversation took place.—*Hutchinson v. Cleary*, 3 N. D. 270, 55 N. W. 729.

(5) Parties can not testify to what in particular.—Where all the parties claim title to certain real estate directly from a person named, as heirs, evidence of the defendants as to communications had personally with such person is inadmissible, under the statute.—*Renz v. Drury*, 57 Kan. 84, 45 Pac. 71. A father gave each of two sons a tract of land. On one tract was a mortgage, and it was claimed that, in order to equalize the gifts, an agreement had been entered into whereby each son should pay one-half of this mortgage debt. Before

the debt was paid the son, whose land was free from incumbrance, died, and the other son brought an action against the administrator of the estate of the deceased son to recover one-half of the mortgage debt. The mother, who had joined the father in the conveyance of the land to the sons, became a witness, and testified as to the agreement with reference to the mortgage debt. It was held that such witness was not to be regarded as an "assignor" of the thing in action, and that she was not precluded from giving such testimony by any of the prohibitions of the statute.—*Miller v. McDowell*, 63 Kan. 75, 64 Pac. 980. In an action brought to foreclose a mortgage, and to render judgment on the notes thereby secured, it appeared that the notes and mortgage sued on had been procured of the defendant by the plaintiff upon the representation that they were needed to tide him over a temporary financial embarrassment, and an agreement on his part to cancel and return them to the maker as soon as they had served that temporary purpose. It was held that, as between the parties to such transaction, the notes and mortgage could not form a basis for the recovery of a judgment in such action.—*Long v. Steele*, 10 Kan. App. 160, 63 Pac. 280. Under the statute of Oklahoma, in an action brought to recover a city lot, claimed to have been leased by plaintiff, and for which the lessee obtained a deed, without notice to the plaintiff, from the board of town-site trustees, while he occupied the lot as a tenant of the plaintiff, and where the lessee died before trial, the plaintiff is not a competent witness to testify that he had made the lease to the lessee, as such testimony constitutes a very important and material part of the evidence produced in behalf of the plaintiff, and is within the inhibition of the statute as to personal transactions or communications had with the deceased.—*Cunningham v. Phillips*, 4 Okla. 169, 44 Pac. 221, 222. In an action on a note, by the legal representatives of the deceased payee, it is proper to exclude the testimony of the defendant, who seeks to prove when and where the note was given, and who was present when the transaction with the testator took place, pursuant to which the note was afterwards given, in order to lay a foundation for the testimony of a third person, by whom he expects to prove what the bargain was. Testimony by the defendant, in such action, to the effect that the note in suit was the only note he ever gave to the deceased, and that he never had any other transaction with the deceased, is likewise prohibited.—*Regan v. Jones*, 14 N. D. 591, 105 N. W. 613. The Colorado statute, fixing the status of ripened counterclaims in cases of assignment or death, and providing that the happening of either of these events shall not affect the right to plead and to rely upon the set-off in case of suit, does not affect the statute which prohibits a party from testifying in his own behalf when the adverse party sues or defends as executor or administrator of any deceased person. And in an action by an administrator, it has been held proper to reject defendant's testimony as to a counterclaim set up by him, against plaintiff's intestate, which counterclaim was due prior to the death

of decedent.—*Rathvon v. White*, 16 Colo. 41, 26 Pac. 323, 324. The fact that a witness is a proper party to an action in which the executor, administrator, or heirs at law of a deceased person are parties, disqualifies such witness from testifying to transactions with, or statements made by, such deceased person. The fact that such witness is a party defendant with the administrator, executor, or heirs does not render him competent as a witness in such cases.—*Cardiff v. Marquis*, 17 N. D. 110, 114 N. W. 1088, 1089; *Marquis v. Morris*, 17 N. D. 119, 114 N. W. 1091. The evidence of a witness, who is a party to an action in which the administrator of a deceased person is also a party, is not admissible to prove the contents of lost letters, which passed between the witness and such person before the latter's death.—*Cardiff v. Marquis*, 17 N. D. 110, 114 N. W. 1088, 1090; *Marquis v. Morris*, 17 N. D. 119, 114 N. W. 1091. Under the rule forbidding a party in an action against an administrator to testify in his own behalf in respect to any transaction had personally with the decedent, such party may not testify to his own conduct, if in so doing he necessarily attributes to the decedent some act or attitude with respect thereto; he may not testify that he rendered services of such a character that if they were performed at all it must have been with the acquiescence of the decedent.—*Clifton v. Meuser*, 79 Kan. 655, 100 Pac. 644. If one, who borrowed money from a person since deceased, becomes administrator of the estate, he is incompetent to prove by his own testimony alone that the decedent agreed to discharge him.—*Estate of Emerson*, 175 Cal. 724, 167 Pac. 149. An administrator can, by means of his own testimony, resist a claim of the estate against him no more than he can enforce a claim of his against the estate.—*Estate of Emerson*, 175 Cal. 724, 167 Pac. 149.

(6) *Partnership affairs in general.*—When a suit was brought against two co-contractors, but one of them died after suit brought, and the action was revived against his administrator, and the other party defendant made default, but the administrator of the deceased party answered, denying the obligation, the surviving obligor, against whom judgment by default was rendered, is not a competent witness for the plaintiff, against his codefendant and joint obligor, as to facts which occurred prior to the death of the deceased obligor.—*Moore v. Schofield*, 96 Cal. 486, 487, 31 Pac. 532. In an action for an accounting between alleged partners, and where the statute disqualifies persons in interest from testifying concerning transactions with insane persons, it is proper to exclude a question asked of the plaintiff as to who composed the partnership, where one of the defendants, alleged to be a partner, is insane. The decedent, who is defending as the guardian of an insane person, is not competent to testify, in her own behalf, as to any transaction had with her codefendant, who is insane.—*Chlopeck v. Chlopeck*, 47 Wash. 256, 91 Pac. 966. In proceedings for the administration of an estate, where the administratrix is claiming one-half of the property, standing in the name of the decedent, she should not be allowed

to testify, over the objection of the heirs, to a partnership agreement between the decedent and the heirs.—*In re Alfstad's Estate*, 27 Wash. 175, 67 Pac. 593, 597.

(7) **Action by or against surviving partner.**—If a surviving partner brings an action to recover alleged partnership property, his testimony authenticating the books of account, but which are not claimed in the record to be partnership books, and which contain transactions of his individual business, as well as of the alleged copartnership business, are not admissible evidence, because they relate to transactions with a deceased person.—*Schwartz v. Stock*, 26 Nev. 128, 65 Pac. 351, 353, 354, 355. So in a suit by a surviving partner to foreclose a mortgage, the defendant can not testify that the deceased partner accepted property under a verbal agreement, in satisfaction of the mortgage, as this would come within the inhibition of the statute, which prohibits testimony relative to transactions between parties, one of whom has since died, and whose representative is engaged in a suit with the survivor.—*Gage v. Phillips*, 21 Nev. 150, 37 Am. St. Rep. 494, 26 Pac. 660, 662: showing change of the statute. The admissions of a surviving partner are, in a suit against him and the estate of his deceased copartner, not competent to show that the debt sued on was a firm debt, particularly in the face of evidence showing that the survivor, prior to the death of his copartner, had assumed the debt as his individual liability, and had given his individual note and security for the supposed extinguishment of any partnership liability.—*Cooper v. Wood*, 1 Colo. App. 101, 27 Pac. 884, 886. So in an action by an administrator against a partnership, a partner, who seeks to set off an individual claim against the partnership indebtedness, is not competent to testify that it was agreed with the firm and the deceased that the debt due deceased was to be applied on the indebtedness of deceased to the witness.—*Rogers v. McMillen*, 6 Colo. App. 14, 39 Pac. 891, 892. Where a partnership existed between two persons, and a settlement was had upon the dissolution thereof, but one of the partners afterwards died, and his administratrix brought suit against the survivor to recover an overpayment made by mistake to the defendant, it is objectionable to ask defendant as to "what transpired at the time of the settlement and all you remember about it," as this question is general, and calls for everything that transpired at that time, including private statements of the deceased.—*Moylan v. Moylan*, 49 Wash. 341, 95 Pac. 271, 272. In an action by or against a surviving partner, the opposing party is not, as a rule, competent to testify to transactions or conversations with the deceased partner. But the opposing party may testify, where the surviving partner was present, and was cognizant of the whole transaction, and where the transaction or conversation proposed to be proved was had with the surviving partner, though before the death of his copartner.—*Bay View Brewing Co. v. Grubb*, 31 Wash. 34, 71 Pac. 553, 556.

(8) **Action on note indorsed to partnership.**—The defendant, in an action on a note executed to him and by him indorsed to a partnership, which in turn transferred it to the plaintiff, and where, at the time action was begun, two of the partners were dead, is not competent to testify that the words "demand and notice waived" were not on the note when he indorsed it, if the statute provides that, where a party sues as deriving title through a decedent, a party in interest may not testify in his own interest as to a transaction by him with decedent. If he were heard to say that such words were not on the note when he indorsed it, he may be heard to say that the note itself has been changed, or that it is not the note he intended to indorse, or he may be heard to contradict or vary the note in any other particular. If the condition of waiver were not upon the note when it was indorsed and delivered, but was subsequently placed there without the consent of the defendant, then the act of placing the condition over the signature of the defendant is not a transaction by the defendant with the deceased person. But when it is admitted that it was a "transaction," then a party in interest, or to the record, the other being dead, can not be heard to detail what that transaction was, or to say that there was no transaction. In other words, when defendant admits that there was a "transaction," he can not be heard to say that there was no transaction for the purpose of showing what the real transaction was. If the fact is that the note or indorsement has been materially changed since he signed and delivered it, that fact must be proved by some other evidence, than evidence by the mouth of the defendant, as to the condition of the note at the time it was indorsed.—*Bay View Brewing Co. v. Grubb*, 31 Wash. 34, 71 Pac. 553, 555.

(9) **Specific performance.**—The testimony of the natural father of plaintiff, who was a party to the alleged contract in a suit for specific performance of a contract to leave property by will against the estate of a deceased person concerning certain acts and conduct of the deceased tending to establish plaintiff's cause of action, is inadmissible under the statute of Nevada, testimony of this character being as much a violation of the letter and spirit of the statute as the admission of testimony as to what was said by the deceased party.—*Forsyth v. Heward*, 41 Nev. 305, 310, 170 Pac. 21. The testimony of the natural mother of plaintiff, who was a party to the alleged contract, in a suit against the estate of a deceased person for specific performance of a contract to leave property by will, concerning circumstances which transpired in connection with the alleged contract, in which the deceased played a part, all tending to establish the alleged contract, including conversations as to adoption of plaintiff, is inadmissible under the statute of Nevada, the other party to the contract being dead and unable to give testimony as to the said circumstances and conversations.—*Forsyth v. Heward*, 41 Nev. 305, 310, 170 Pac. 21. The plaintiff in an action against an heir to enforce specifically an alleged promise by the decedent to devise property in reward for services rendered, is

incompetent as a witness to prove the promise.—*James v. Lane*, 103 Kan. 540, 175 Pac. 387. In an action to enforce the specific performance of a contract to purchase real estate, in which contract the decedent is named as vendee, and which action is brought by the administrator of the vendee's estate, the defendant can not testify that he informed the decedent that the contract was forfeited, although time was of the essence of the contract.—*Shorett v. Knudsen*, 74 Wash. 448, 450, 133 Pac. 1029.

(10) **Implied contract.**—A party to a civil action against the administrator of the estate of a decedent is incompetent to testify, in his own behalf, to facts which will raise an implied contract between such party and the decedent.—*Fuss v. Cocannouer* (Okla.), 172 Pac. 1077.

(11) **Deeds.**—In an action against an executor and the heirs at law of the estate of a deceased, to secure the delivery of a deed and to quiet title to realty claimed by the estate, the testimony of the executor, the husband of the plaintiff, concerning a transaction had with the deceased, is not made admissible under the provisions of the North Dakota statute, by calling such witness as an adverse party for cross-examination, where it appears that such evidence and such witness are antagonistic to the interests of the estate.—*Druey v. Baldwin* (N. D.), 172 N. W. 663. In a suit to cancel a deed upon the ground of forgery, the plaintiff called the defendant, who acquired the cause of action immediately from a deceased person, for the purpose of taking his deposition, and required him to testify in respect to certain transactions had with such deceased person; and it was held that, upon the subsequent trial, the incompetency to testify, imposed by the statute upon the defendant, was waived, whether the deposition was ever completed and filed in court or not.—*Cox v. Gettys*, 53 Okla. 58, 156 Pac. 892. A person who has contracted to purchase land and, having insufficient means, has sought aid from another, since deceased, executing a deed of the land to him and taking back a contract to reconvey, on payment of principal and interest as therein specified, may not, after assigning by quitclaim all his right in the premises, testify in behalf of the assignee, as to what was the nature of the transaction, when the assignee makes tender to the administrator and demands a deed.—*Gilmore v. Hoskinson*, 98 Kan. 86, 157 Pac. 426. A widow who defends in an action to quiet title to property conveyed as his separate estate by her husband in his lifetime to plaintiff, will not be permitted, under section 1211, Rem. Code, to testify that a prior conveyance of said property by her to her husband was executed for business purposes, and was not intended to change the estate from community to separate property, she being a party in interest on the record in view of the fact that she would be entitled to a one-half interest in said property, as the surviving spouse, if the conveyance by her husband should be held invalid.—*Brown v. Davis*, 98 Wash. 442, 445, 167 Pac. 1095. A witness who is incompetent to testify, under the provisions of the statute concerning transactions had with a deceased person, is incompetent to testify as to the nature of the transaction.—*Probate Law*—172

dent, directly to the delivery of a deed by the deceased, is likewise incompetent to testify as to the possession of the same, where the purpose thereof is to establish that a delivery or non-delivery thereof must be inferred.—*Druey v. Baldwin* (N. D.), 172 N. W. 663. Under the Oklahoma statute, a freedman Creek female allottee is not competent to prove an alleged conversation with her grantee, then dead, tending to show that her deed, executed upon sufficient consideration, and after she became of age, was given in ratification of former deeds, taken during her minority.—*Bell v. Mills*, 60 Okla. 72, 158 Pac. 1173. In the case of a lost deed, claimed to have been executed and delivered to the plaintiff's grantor, by one of the defendants and his wife, who died subsequently, an affidavit showing such execution and delivery, describing the property conveyed, and stating the nature of the deed and the consideration, is an admission against interest and admissible against all the defendants, if these are the affiant and his children.—*Margett v. Wilson*, 85 Wash. 98, 147 Pac. 628.

(12) **Claim against estate.**—Under the statute of Montana, as amended in 1913, where an action is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person, the plaintiff is an incompetent witness, unless the defendant waives the incompetency; or, unless it appears to the court that, if the witness is not allowed to testify, recovery can not be had upon a cause of action which is obviously meritorious; under the exception of the statute, it is within the sound discretion of the court in each case to determine whether the testimony is necessary to enable the plaintiff to make out a prima facie case, and thus prevent an injustice.—*Roy v. King's Estate*, 55 Mont. 567, 179 Pac. 821. In an action against the administrator of a deceased person on a rejected claim against the estate, in the form of an open account for services alleged to have been performed for, and money loaned to, such deceased person by the plaintiff, the testimony of the plaintiff with respect to the transactions involved in such claim, had personally with the deceased, is properly excluded.—*Richardson v. Strother*, 55 Okla. 348, 155 Pac. 528.

REFERENCES.

Incompetency of witness to testify as to claim against estate.—See subdivision (1), *supra*.

(13) **Same. Physician's services to deceased.**—A physician who has performed professional services for a deceased person can not testify, as to any matter of fact which occurred before the death of the deceased, in his own favor, or in favor of an assignee.—*McGlew v. McDade*, 146 Cal. 553, 80 Pac. 695; and it is error, in an action against an administrator by a physician for services rendered the defendant's decedent, to permit the physician's wife to testify to statements made by the deceased as to such services, where the statute declares that, in an action where the adverse party sues or defends an administrator, a party in interest, or to the record, shall not be permitted to testify in

his own behalf to statements made by the decedent. The compensation for such services belongs to the community, and the wife is interested equally therein with her husband.—*Whitney v. Priest*, 26 Wash. 48, 66 Pac. 108. In a proceeding to establish a claim for medical services against a decedent's estate, a physician is not qualified to testify against the administrator's objection, on any matter, or at all, under the statute in Colorado.—*Temple v. Magruder*, 36 Colo. 390, 85 Pac. 832. Under section 1880 of the California Code of Civil Procedure, parties to an action against an executor or administrator on a claim or demand against the estate arising out of a fact or transaction prior to the death, can not be witnessed. Under this section, a physician suing an estate for his services to the deceased during the last illness is not a competent witness, in an action upon his claim or demand, to testify to it, and can not testify as to the correctness of his books of accounts offered in evidence.—*Colburn v. Parrett*, 27 Cal. App. 541, 150 Pac. 786. But where a physician brought an action against a guardian upon an account to recover for medical services rendered and medicines furnished to a woman, who afterwards died, and to her husband, who was afterwards adjudged to be insane, and where the guardian stood by and permitted entries in the plaintiff's properly identified account book, containing memoranda as to diseases and conditions as they developed during the treatment, to be read into the evidence at the taking of a deposition at a very great distance from the scene of the trial, and in another state, such evidence should not be excluded under the statute relative to testimony as to transactions with a person since deceased or incompetent.—*Sanborn v. Dentler*, 97 Wash. 149, 166 Pac. 62.

REFERENCES.

Competency of plaintiff, as witness, in an action by physician against a decedent's estate, for services rendered to the deceased.—See note 8 Am. & Eng. Ann. Cas. 147.

(14) **Fraud.**—Under the statute of Oklahoma, no party shall be allowed to testify, in his own behalf, to any transaction or communication had personally, by such party, with a deceased person, when the adverse party is the assignee of such deceased person, where he has acquired title to the cause of action immediately from such person; but the statute does not prohibit the proof of transactions and communications, had personally between a party to the suit and the deceased grantee of such person, by disinterested witnesses, or other competent evidence, besides that of a party to the suit. In an action by the grantor, to set aside a deed conveying lands, against a person who has acquired title to the land in controversy immediately from the deceased grantee of such grantor, the grantor is not allowed to testify, in his own behalf, to any transactions or communications had by him individually with his grantee, who is deceased, whether such transactions or communications are oral or in writing.—*Conklin v. Yates*, 16 Okla. 266, 83 Pac. 910, 913, 915. Facts which constitute fraud on the

part of a deceased person necessarily include personal transactions or conversations with such deceased person.—*Conklin v. Yates*, 16 Okla. 266, 83 Pac. 910, 912. A stockholder in a joint stock corporation is a "person directly interested" in an action by the corporation against an administrator to recover money of the corporation misappropriated by the deceased and as such is incompetent to testify in the action.—*Brown v. First Nat. Bank*, 49 Colo. 393, 113 Pac. 484.

(15) *Gifts*.—If the subject-matter of litigation is the validity of a gift to a woman, since deceased, the husband and heir of the deceased is not, in an action between her administrator and one claiming the property as a gift *causa mortis* from her, a competent witness on behalf of the administrator as to matters occurring before the wife's death.—*Conner v. Root*, 11 Colo. 183, 17 Pac. 773, 777; neither is one who seeks to establish a *parol gift causa mortis* a competent witness to prove the gift as against the executor of the deceased donor.—*Hecht v. Shaffer*, 15 Wyo. 34, 85 Pac. 1056, 1057.

(16) *Promissory notes*.—If the original payee of a note brings an action thereon against the administratrix of the maker, he is incompetent to testify that he saw the maker sign it, when the execution of the same was a part of the trade between the maker and himself; but when the execution of the note is established fully by other and competent evidence, the error in permitting the plaintiff to testify is not reversible.—*Bryant v. Starbrook*, 40 Kan. 356, 19 Pac. 917. If the plaintiff in an action on a note against two defendants has died, and an administrator has been substituted, one of the defendants is not a competent witness to testify for his codefendant, though such codefendant is not within the jurisdiction of the court, and has not been served with process, where the statute provides that no party to a suit, or person directly interested therein, shall testify, when the adverse party sues as administrator.—*Williams v. Carr*, 4 Colo. App. 363, 36 Pac. 644, 645. And the maker of a note, in an action by an executor thereon, is incompetent to testify as to transactions over which the note arose.—*Jones v. Henshall*, 3 Colo. App. 448, 34 Pac. 254, 255. So a party, sued by an administrator on notes which purport to have been executed in the state wherein suit is brought, will not be permitted to testify that they were executed in another state, where such evidence is not within any of the exceptions of the statute providing that a party shall not testify against an administrator who is the adverse party, except in specified cases.—*Bliller v. Boswell*, 9 Wyo. 57, 59 Pac. 798, 801. And where it is admitted by the defendant that he indorsed a note, executed to a person since deceased, the act of indorsement was as much a "transaction" with the deceased as the signing of the note could be; and where the maker of a note is sued, and the executor or administrator of the payee sues as deriving a right by or through a deceased person, where the signature is confessed, the maker can not be heard to testify, after the death of the payee, that the note had been altered

or changed after execution and delivery without his consent; and the same rule applies to the indorsement. In an action by the administrator on the note, the defendant will not be permitted to vary the indorsement by his testimony.—*Bay View Brewing Co. v. Grubb*, 31 Wash. 34, 71 Pac. 553, 555. In an action on a joint promissory note, against one maker and the administrator of the other maker, to foreclose stock alleged to have been pledged as security for the payment of the note, the plaintiff's testimony as to whether the stock was delivered to him as a pledge is not admissible.—*Robison v. Gull* (Utah), 173 Pac. 905. In an action by an executor for the price of a note sold to the defendant, the defendant can not testify as to payments made by him to the deceased.—*Goldsworthy v. Oliver*, 93 Wash. 67, 160 Pac. 4.

(17) *Establishment and enforcement of trusts.*—In an action wherein it is sought to base a trust on an agreement with the deceased, the plaintiff is incompetent to testify to his agreement with deceased.—*Fetta v. Vandevier*, 3 Colo. App. 419, 34 Pac. 168, 169; *Vandevier v. Fetta*, 20 Colo. 368, 38 Pac. 466. In a suit against executors to enforce a trust against the decedent's estate, plaintiff's testimony is properly excluded.—*Wood v. Fox*, 8 Utah 380, 32 Pac. 48, 53 (approved in *Whitney v. Fox*, 166 U. S. 637, 17 Sup. Ct. 713, 41 L. Ed. 1145); *Delmoe v. Long*, 35 Mont. 139, 88 Pac. 778; *Rice v. Rigley*, 7 Ida. 115, 61 Pac. 290. But in California, it is held that the plaintiff is a competent witness to establish and to enforce a trust against the personal representative, even though it incidentally tends to establish a contract between the plaintiff and the deceased during his lifetime.—*Myers v. Reinstein*, 67 Cal. 89, 7 Pac. 192; *Tyler v. Mayre*, 95 Cal. 160, 170, 27 Pac. 160, 30 Pac. 196. The statute of Montana was doubtless adopted from the code of California, but the court in *Delmoe v. Long*, 35 Mont. 139, 88 Pac. 778, 782, declined to follow the construction given to it by the courts of California on the ground that such construction does not seem to be "reasonable"; and, in *Rice v. Rigley*, 7 Ida. 115, 61 Pac. 290; overruling *Nasholds v. McDonell*, 6 Ida. 377, 55 Pac. 894, repudiated the construction of the California court, as giving too narrow a meaning to the terms "claim" and "demand." So in Colorado, a person claiming to be a widow, who sues a trustee and an heir, to establish a trust and to obtain an interest in property, is prohibited from giving testimony material to the subject-matter of the inquiry, where the statute provides that no party shall testify, of his own motion, if the adverse party defends as heir.—*Carpenter v. Ware*, 4 Colo. App. 458, 36 Pac. 298, 299. Under such a statute where the plaintiff is seeking to establish a trust in land, standing in the name of defendant's deceased father, the plaintiff is incompetent to testify to his agreement with the decedent, on which he seeks to base the trust, notwithstanding the failure of a guardian ad litem for a minor defendant, and the court below, to protect the minor's right by objecting to, or excluding, testimony so manifestly incompetent.—*Vandevier v. Fetta*, 20 Colo. 368, 38 Pac. 466; *Fetta v. Vandevier*, 3 Colo. App. 419, 34 Pac. 168. Land

was conveyed to a wife who subsequently died leaving a will whereby she devised the land to her husband. The wife's mother then claimed the land as having been bought with her money and was allowed to put in evidence entries in her books of account showing payments of money by her to her daughter and she then sought to explain those entries by stating that the payments were made to the daughter on account of the purchase price of the land but was not allowed to do so on the ground that it would infringe the rule against testifying as to transactions had with a decedent.—*Smith v. Scott*, 51 Wash. 330, 98 Pac. 763. The plaintiff, in a suit to obtain a decree declaring the executor and heirs of the estate of the plaintiff's alleged co-owner in a mining claim trustees for his benefit of an undivided interest therein, is incompetent to testify as to conversations had between him and the decedent pertaining to the property and its title.—*Delmoe v. Long*, 35 Mont. 139, 149, 88 Pac. 778. (Citing Code Civ. Proc., § 3162.) In a suit by an administratrix to cancel a conveyance of property made by deceased, where the defendant pleaded affirmatively that the conveyance was made in accordance with a trust resulting from his having paid the purchase price in a former conveyance to deceased, he was properly not allowed to testify to any fact tending to establish a resulting trust, involving any transaction had by him with deceased.—*Brucker v. DeHart*, 106 Wash. 386, 180 Pac. 397, 398.

18. Contest of will, or of its probate.—In an action brought by the heirs at law against the devisees and executrix to contest a will, the heirs are not competent witnesses to testify, in their own behalf, concerning communications had personally with the deceased testator.—*Wehe v. Mood*, 68 Kan. 373, 75 Pac. 476. In proceedings to contest the probate of a will, where the question at issue was whether a certain will was executed subsequent to the one offered for probate, and where the proponent, who was the husband of the testatrix, offered to testify as to transactions, concerning the earlier will, between the witness and the deceased, in her lifetime, and which transactions were such as could not be contradicted by any person except the deceased, such testimony was properly excluded on the ground that the witness was a party to the action, and that his testimony was prohibited by the statute.—*Starkweather v. Bell*, 12 S. D. 146, 80 N. W. 183, 185, 186. In the case of *In re Atwood's Estate*, 14 Utah 1, 60 Am. St. Rep. 878, 45 Pac. 1036, devisees were held, in a will contest, not to be competent witnesses against a child omitted from the will; but this case was overruled by *In re Miller's Estate*, 31 Utah 415, 88 Pac. 338, 345, so far as the former conflicted with the latter. In the latter case, which was one brought to revoke a will, alleged to have been executed under undue influence, and where the controversy was between living parties, who, on the one side, were the devisees or legatees under the will, and on the other, the heirs at law of the testator, it was held that all of the parties interested were competent to testify to any fact which was relevant and material to the issue in-

volved.—In *re Miller's Estate*, 31 Utah 415, 88 Pac. 338, 345. But, while the weight of authority is, perhaps, in favor of the contention that the probating of a will is a proceeding in rem and ex parte, and in which the heirs and devisees are competent to testify, notwithstanding the inhibition of the statute as to parties in interest, the rule in Colorado is that the provisions of the statute render them incompetent to testify. Such is the Illinois rule from which the Colorado statute was adopted. No distinction is there made between actions to contest a will after probate, and proceedings to contest the probate of a will. The purpose of the proceeding is the same, in each instance, to wit,—to divest the legatees and devisees of all right in the estate of the testator, and to vest the property in his heirs at law.—In *re Shapter's Estate*, 35 Colo. 578, 117 Am. St. Rep. 216, 85 Pac. 688, 691. The executor of a will is a party to a will contest, and is not a competent witness; and one who is not a beneficiary under the will but is a party to the proceeding is not competent to testify in a contest thereof.—In *re Shapter's Estate*, 35 Colo. 578, 117 Am. St. Rep. 216, 85 Pac. 688, 691. In an action brought to revoke a will, the heir of the testator is not competent to testify as to matters of fact which must have been equally within the knowledge of the testator, or as to any transactions with or statements made by him.—In *re Miller's Estate*, 31 Utah 415, 88 Pac. 338, 345. A witness who had a single transaction with the testator years before the making of the will—"a real estate transaction," is incompetent to testify as to testamentary capacity.—In *re Ross' Estate*, 173 Cal. 178, 159 Pac. 603. The widow of a decedent who, in a proceeding for the probate of a will and the settlement of an estate, sets up that she is such widow and is entitled to one-half of the decedent's property, is a party to the action and directly interested in the event of the action; she is, therefore, within the bar of a statute that prohibits a party or person interested from testifying in his own behalf; such a statute applies in probate proceedings; an assignee of part of whatever she might recover is also within the same bar.—*Stratton v. Rice* (Colo.), 181 Pac. 529, 531. The exceptions in the Colorado statute, that prohibits a party or person interested in the event of an action from testifying in his own behalf, cover testimony by witnesses to "conversations and transactions" with the deceased, in a proceeding for the probate of a will and the settlement of an estate, wherein a woman sets up that she is the decedent's widow and entitled to one-half of his estate; the introduction, by the opposite party, of deposit slips and checks in the handwriting of the deceased does not make her a competent witness.—*Stratton v. Rice* (Colo.), 181 Pac. 529, 531.

19. Incompetency in other particular instances.—Under the statute of Idaho, which prohibits parties or assignors of parties to any action or proceeding prosecuted against an executor or an administrator, upon a claim or demand against the estate of a deceased person, from being witnesses as to any matter of fact occurring before the death of

such deceased person, evidence of conversations with the deceased relative to a trust agreement or other disposition of his property is inadmissible.—*Coats v. Harris*, 9 Ida. 458, 75 Pac. 243, 246. So in an action on a contract for services alleged to have been rendered by the plaintiff, a married woman, to the deceased, in his lifetime, as nurse and attendant upon him, the plaintiff's testimony relating to matters of fact which must have taken place in the lifetime of the deceased employer, concerning the course of conduct of herself and husband with respect to her earnings, is properly excluded as inadmissible.—*Kaltschmidt v. Webber*, 145 Cal. 596, 597, 598, 79 Pac. 272. So in an action for damages for breach of a contract, a witness who has acknowledged, in writing, that he was jointly interested with plaintiff in the contract, for the breach of which damages are sought in such action, is incompetent to testify to facts which occurred before decedent's death.—*Uhlhorn v. Goodman*, 84 Cal. 185, 192, 23 Pac. 1114. A corporate stockholder in a suit by him for the benefit of the company on a bond against the administrator of the principal obligor is disqualified under *Mills's Ann. Stats.*, section 4816 of Colorado, and such disqualification is not removed by the fact that one of the sureties on the bond is still living.—*Cree v. Becker*, 49 Colo. 268, 112 Pac. 785.

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